Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN,
R. FRIEDRICH AND SONS, INC. and
BUCK CONSTRUCTION COMPANY, INC.
Petitioners,
vs.
STATE OF IOWA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

This case presents questions which involve this Court's decision in Lucas v. South Carolina Coastal Council and related cases.

1. Whether a regulatory taking occurs when, but not until, the implementation of an enabling statute impacts property to the extent that all of its economically viable use is taken.

2. Whether there is a difference between an enabling statute that may be implemented in the future to regulate property, and a statute that immediately and directly regulates property.

3. Whether a property owner's right to compensation under the Fifth Amendment is transferable.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

RULE 29.1 STATEMENT

R. Friedrich and Sons, Inc. and Buck Construction Company, Inc. are corporations but are not parent nor subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI

The Plaintiffs respectfully pray that a Writ of Certiorari issue to review a decision of the Iowa Supreme Court.

OPINIONS BELOW

The Iowa Supreme Court issued its decision on July 27, 1994. (App. A) The Iowa Supreme Court denied Petitioners' request for rehearing of the case on September 21, 1994. (App. B)

JURISDICTION

This case involves the regulatory taking of a lot suitable for construction of a single family residence, which use the State of Iowa by and through its state archaeologist has prohibited and thereby has taken all economically viable use of the property.

The Petitioners sought relief under the Fifth and Fourteenth Amendments to the United States Constitution from the Iowa District Court on the basis that the governmental action was a regulatory taking of their property without just compensation. The federal questions were thus raised at the earliest opportunity and were briefed and argued in all Iowa Courts.

The District Court denied the Petitioners compensation. That decision was timely appealed to the Iowa Supreme Court which also denied compensation to the Petitioners. A timely petition for rehearing was denied by the Iowa Supreme Court on September 21, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

STATEMENT OF THE CASE

In 1976 the Iowa Legislature passed Ancient Human Remains statutes[1] that enable the state archaeologist, after making a significant find, to either (a) have the remains removed and reinterred in a cemetery established specifically for that purpose or (b) refuse permission to remove and reinter the remains and thereby prohibit the use of the property that would in any way disturb the remains.

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[1]Section 263B.7 Code of Iowa, authorizes the state archaeologist to investigate, preserve and reinter discoveries of ancient human remains more than 150 years old. Section 263B.8 Code of Iowa, establishes a cemetery for reburial of ancient human remains found in the state. Section 263B.9 Code of Iowa, authorizes the state archaeologist to deny permission to disinter ancient human remains. Section 716.5(2) Code of Iowa, makes it a criminal offense to disinter ancient human remains that have been designated as a significant find by the state archaeologist.

On May 1, 1990, the Plaintiffs home builders sold Lot 15[2] to Dr. Jon Fleming for him to construct a family residence. In April, 1991, just prior to excavation for the basement of Dr. Fleming's house, an unknown individual had the state archaeologist probe for ancient human remains. In one of twelve probes the state archaeologist found an approximately one cubic inch of human vertebrae and three other small fragments of vertebrae surfaces plus five tiny unidentifiable fragments. The state archaeologist thereupon designated a 34 foot diameter burial mound with a 50 foot buffer zone around that as a "significant find" under the Ancient Remains Statute of the Code of Iowa on Lot 15, and warned Dr. Fleming in a letter dated April 30, 1991, of the criminal penalties concerning disinterment of the remains. It is uncontroverted that prior to the action of the state archaeologist making a significant find that neither the Plaintiffs nor Dr. Fleming had any idea or indication that ancient human remains might exist on Lot 15.

The Plaintiffs thereupon refunded Dr. Fleming his purchase price of the lot plus his architectural fees involved with the lot. Dr. Fleming in turn conveyed back and assigned to the Plaintiffs in a Quit Claim Deed all his right, title, interest, estate, claim and demand in Lot 15. This was done by the Plaintiffs as a normal and proper business act of good will.

The Plaintiffs then offered to the state archaeologist that they would move the mound and its remains, at their expense, to a site in a wooded city park, which the state archaeologist refused to allow. The state archaeologist also

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[2]Lot 15 of the Second Addition to Northridge Parkway Subdivision, Ames, Iowa.

refused to disinter the ancient human remains and reinter them in the special cemetery established under the Code of Iowa for reburial of ancient human remains.

There is no dispute in this case that a regulatory taking has occurred. There is no dispute in this case that all economically viable use of the property in question has been taken.[3] The dispute in this case is whether the Plaintiffs should be precluded from receiving just compensation for this regulatory taking.

The majority decision of the Iowa Supreme Court in a split decision[4] cited the Lucas case[5] as authority to deny the Plaintiffs just compensation since Lot 15 was purchased after the passage of these enabling statutes[6] in 1976 and 1978. The majority decision cited the Lucas case as authority for its holding that all property owners who purchase their property after the passage of the Ancient Human Remains statutes in 1976 and 1978 are precluded from receiving just compensation for a taking under these statutes.

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[3]The only economically viable use of Lot 15, the construction of a family residence, was taken. The market value of Lot 15 was reduced from $59,000 to $100 by the regulatory action of the state archeologist. The majority and dissenting opinions of the lower court recognized that there was a regulatory taking in this case. The majority opinion states that "there was no fact issue on the issue of taking." The dissenting opinion stated that "The prohibition by the State of Iowa from using the burial mound in the instant case is a complete taking because there is no practical use of it left to the Plaintiffs."

[4]Hunziker & Furman, et al. v. State, 519 N.W.2d 367 (1994).

[5]Lucas v. South Carolina Coastal Council, 505 U.S. _____, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[6]The term enabling statute is defined in the text on pages 6-7.

The dissenting opinion of the Iowa Supreme Court ruled that the Lucas case supports the Plaintiffs' claim for just compensation. It recognized that the mere passage of these enabling statutes do not constitute a taking. It held that the regulatory taking occurred at the point of time that the government implemented these statutes against Lot 15 which impacted the property to the extent that all economically viable use of the property was taken. It ruled that under the authority of the Lucas case the Plaintiffs are entitled to just compensation for this regulatory taking.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The majority decision of the lower court misconstrued and misapplied the rulings of this Court in Lucas, and other previous cases, to preclude these Plaintiffs from receiving just compensation for a regulatory taking of their property. The majority decision of the lower court incorrectly held that the Lucas case is authority for its ruling that any property owners who purchase property after the passage of an enabling statute, but before its implementation, are precluded from receiving just compensation for a regulatory taking of their property. This lower court decision, unless reversed, will bar all property owners in the State of Iowa from ever receiving just compensation for a taking under these Ancient Human Remains statutes. Further, This lower court decision, unless reversed, will be used as authority, contrary to the Lucas case, to improperly preclude property owners from receiving just compensation guaranteed to them by the Fifth Amendment.

The lower court decision in this case is in conflict with, and contrary to, the rulings of this Court in not only Lucas v. South Carolina Coastal Council[7]; but also in Keystone Bituminous Coal Ass'n v. DeBenedicts[8]; Hodel v. Virginia Surface Mining and Reclamation Association, Inc.[9], First English Evan. Luth. Ch. v. Los Angeles Cty.,[10] MacDonald, Sommer and Frates v. Yolo County[11], and Williamson County Regional Planning v. Hamilton Bank[12], which all rule that a taking occurs when, but not until, the governmental action in question impacts a property to the extent that all economically viable use is taken.

Amplification from this Court is needed to clarify and confirm the rule that a regulatory taking occurs at the point of time, but not until, an enabling statute is implemented by a final decision that impacts a property to the extent that all economically viable use of the property is taken. The term enabling statute, as used herein, encompasses a statute or

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[7]Lucas v. South Carolina Coastal Council, 505 U.S. _____, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[8]Keytone Bituminous Coal Ass'n v. DeBenedicts, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

[9]Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

[10]First English Evan. Luth. Ch. v. Los Angeles Cty., 482 U.S. 304, 96 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

[11]MacDonald, Sommer and Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

[12]Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

decree which is not self-executing, but is implemented and impacts the land by the regulatory action of a governmental agency, board, administrator, etc. The dissenting opinion of the lower court correctly recognized the Lucas case as authority entitling these Plaintiffs to just compensation from the regulatory taking by the state archaeologist implementing the Ancient Human Remains statute against Lot 15. Guidance from this Court is needed to establish a rule recognizing the difference between an enabling statute and a statute that directly regulates property.

Finally, both the majority and dissenting opinions recognize that Dr. Fleming assigned Plaintiffs his rights to compensation due to inverse condemnation. Thus, this case also presents the question of whether a property owner's right to compensation under the Fifth Amendment is transferable as one of the "bundle of rights" that accompanies the sale of property. This Court's guidance is needed to answer this question in the affirmative.

I. AMPLIFICATION IS NEEDED TO CLARIFY AND CONFIRM THE RULE THAT A REGULATORY TAKING OCCURS WHEN, BUT NOT UNTIL, THE IMPLEMENTATION OF AN ENABLING STATUTE IMPACTS PROPERTY TO THE EXTENT THAT ALL OF ITS ECONOMICALLY VIABLE USE IS TAKEN

The Lucas case does not establish a rule, as the lower court has incorrectly fashioned, that if an enabling statute is passed prior to the purchase of a parcel of land the purchaser is precluded from receiving just compensation for a

regulatory taking of that land. The Lucas case instead provides that a landowner is to receive just compensation for a newly legislated or decreed regulatory taking. The Lucas case implies, but does not specifically state, the rule that when an enabling statute is implemented, the regulatory taking occurs at the time the statute is implemented. Amplification is needed to clarify and confirm the rule that when an enabling statute is implemented, the regulatory taking occurs at that point of time since it is at that point of time that all economically viable use and/or investment backed expectations in the land are taken.

A. The lower court's failure to recognize that a regulatory taking occurs at the point of time that, but not until, the government action impacts the property to the extent that all economical use is taken is in conflict with previous decisions of this Court

It is clear in this case that the regulatory action of the state archaeologist prohibiting the use of Lot 15 for the construction of a family residence has taken all the economically viable use of that lot. There has been a regulatory taking of Lot 15 in this case from the impact of the regulatory action of the state archaeologist refusing permission to rebury the ancient human remains elsewhere. However, in spite of the Lucas decision which held that the constitutional guarantee of just compensation includes regulatory takings, the majority decision of the Iowa Supreme Court denied these Plaintiffs just compensation.

The majority decision of the lower court misconstrued the Lucas case and improperly denied these Plaintiffs just compensation on the basis that the Iowa Statutes in question were passed before Lot 15 was purchased. The lower court erred in holding that any taking under these Ancient Human Remains statutes occurred when they were passed in 1976 and 1978. The regulatory taking occurred in this case in 1991 when these statutes were implemented.

The majority decision of the lower court is contrary to, and in conflict with, the Lucas, Keystone, Hodel, First English, MacDonald, and Williamson County cases which establish the rule that the mere passage of a statute does not constitute a taking, and that there is no taking until a final decision applies the statutes in question against the property and impacts the property to the extent that all its economically viable use is taken.

The Hodel case involved a preenforcement challenge to a regulatory statute, which can properly be characterized as an enabling statute. This Court recognized that the "taking" question is done on essentially an ad hoc basis when there is an actual taking. (Emphasis Added.) This Court recognized that the mere enactment of an enabling statute does not in and of itself constitute a taking. It was also recognized that a taking occurs at the time when the owner is denied the economically viable use of his property. This Court stated as follows:[13]

> Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or

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[13]452 U.S. at 296 and 297, 101 S.Ct. at 2370 and 2371.

its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking. See Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land . . . ." Agins v. Tiburon, supra, at 260, 100 S.Ct., at 2141. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The Surface Mining Act easily survives scrutiny under this test.

First, the Act does not, on its face, prevent beneficial use of coal-bearing lands. Except for the proscription of mining near certain locations by § 522(e), the Act does not categorically prohibit surface coal mining; it merely regulates the conditions under which such operations may be conducted. The Act does not purport to regulate alternative uses to which coal-bearing lands may be put. Thus, in the posture in which these cases comes before us, there is no reason to suppose that "mere enactment" of the Surface Mining Act has deprived appellees of economically viable use of their property.

The Keystone case also involved a facial constitutional challenge to an enabling statute where it was again recognized that the mere passage of a statute does not in and of itself constitute a taking, and that a taking does not occur until the point of time that the government regulation impacts the property to the extent that all economically viable use is taken. This Court stated as follows:[14]

> The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation. This point is illustrated by our decision in Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), in which we rejected a preenforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977.

Likewise, the Iowa Ancient Human Remains statutes in question, on their face, do not immediately or directly regulate Lot 15. A family dwelling could have been constructed on Lot 15 anytime before the state archaeologist made a significant find and denied permission to rebury the remains in the special cemetery established for that purpose. If the state archaeologist had determined the find was not significant, a family dwelling could have been constructed on

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[14]480 U.S. at 493, 107 S.Ct. at 1246.

Lot 15. If the state archaeologist had allowed the ancient human remains to be reburied in the special cemetery established for that purpose, a family dwelling could have been constructed on Lot 15.

When the Ancient Human Remains statutes in question were passed, no landowner in the entire state had any notice whether the statutes applied to their property, and there was no way of knowing whether the state archeologist would grant or deny permission to disinter and rebury any ancient human remains if and when the statutes were applied to their property. It is not until the state archaeologist takes the regulatory action under the enabling statutes in question of denying permission to rebury the ancient human remains in the special cemetery established for that purpose, that a regulatory taking occurs under these Ancient Human Remains statutes. The regulatory taking, in this case, occurred after the purchase of Lot 15. The regulatory taking, in this case, therefore, comes within the purview of the Lucas case which entitles these Plaintiffs to just compensation for the regulatory action of the state archaeologist newly decreeing the denial of permission to rebury the ancient human remains.

The Lucas case recognized that the "Fifth Amendment is violated when land use regulation . . . '*denies an owner economically viable use of his land*'"[15] (Emphasis Added.) It was further stated "We think, in short that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common

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[15]505 U.S. at _____, 112 S.Ct. at 2894.

good, that is, to leave his property economically idle, he has suffered a taking."[16] (Emphasis Added.)

The Lucas case states that any limitation so severe that it prohibits all economically beneficial use of land cannot be "newly legislated or decreed" without compensation.[17] The majority decision of the lower court erred in failing to recognize that the implementation of the Ancient Human Remains statutes against Lot 15 was a newly decreed regulatory taking. The dissenting opinion of the Iowa Supreme Court correctly found that the implementation of the Ancient Human Remains statute against Lot 15 was a newly decreed regulatory taking for which the Plaintiffs are entitled to just compensation under the Fifth Amendment pursuant to the Lucas case.

The thoughtful and expressive dissenting opinion of the Iowa Supreme Court states as follows:

> The prohibition by the State of Iowa from using the burial mound in the instant case is a complete taking because there is no practical use of it left to the plaintiffs. It is more insidious than zoning laws that we have held to effect a taking when they deny the economically viable use of the land. See Against v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L.Ed. 2d 106, 112 (1980); Osborn v. City of Cedar Rapids, 324 N.W.2d 47, 474 (Iowa 1982); Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979). It is pernicious because

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[16]505 U.S. at _____, 112 S.Ct. at 2895.

[17]505 U.S. at _____, 112 S.Ct. at 2900.

there is virtually no notice to a landowner of the State's claim and no opportunity to review the government action or appeal to the courts.

The Iowa statutes cited as preventing full ownership of land containing a burial mound give no notice of the State's inchoate claim of authority to deny compensation while prohibiting use. See Iowa Code §§ 263B.7, 263B.9, and 716.5(2) (1993). Nor do they state or even imply that land with a burial mound bears a perpetual cloud on the title removable only by authority of the state archaeologist. Section 305A.9, giving the state archaeologist authority to deny permission to disinter human remains, is not a self-executing statute creating a covenant running with the land. By its own terms the statute is implemented only by an application for permission to disinter. Moreover, there is no indication from the language of these statutes that the legislature intended to take property for historical or scientific inspiration without paying for it.

In this case, a dead bones doctrine has risen from the soil, like a phoenix, to consume the live marrow of land ownership. The history surrounding these ancient bones should be preserved by granting compensation for its resurrection.

The date when an enabling statute is passed is not the significant date of concern when considering a regulatory taking. The significant date of concern under an enabling statute is the date that the regulatory action of the government implements the statute to impact upon the property to the extent that there is a substantial interference with investment backed expectations, and/or when the owner is deprived of all economically viable use of the property.

B. The lower court's ruling is contrary to previous decisions of this court concerning the taking date, ripeness and when an action for inverse condemnation accrues.

The majority decision of the Iowa Supreme Court in this case is contrary to the taking date, ripeness and accrual of action rules established by this Court. The majority decision of the lower court incorrectly would require a property owner to challenge these Ancient Human Remains statutes at the time they were passed, regardless of whether they have been or ever will be applied to a particular property. The MacDonald and Williamson County cases hold in reference to a regulatory taking that a taking has not occurred, and a case is not ripe for judicial review, until the government makes a final decision and thereafter fails to provide adequate compensation for the taking.

This Court in the MacDonald case[18] held as follows:

> A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. Id. at 106 S.Ct. 2566. Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed." Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 190, n. 11, 105 S.Ct. 3108, 3116, 3118, n. 11, 87 L.Ed.2d 126 (1985). Id. at 106 S.Ct. 2566.
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> ("[T]he State's action here is not 'complete' until the State fails to provide adequate compensation for the taking" (footnote omitted)). Id. at 106 S.Ct. 2566.
>
> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. Id. at 106 S.Ct. 2567.

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[18]MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

This Court in the Williamson County case[19] held as follows:

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. In Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), for example, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. §1201 et seq., effect a taking . . .

Id. at 105 S.Ct. 3116-3117.

The MacDonald and Williamson County cases, while recognizing that a taking does not occur until the point of time that all economically viable use and/or all investment backed expectations are taken, also spoke of ripeness for judicial consideration as did the Lucas case.[20] Under the rulings of this Court in the Lucas, Keystone, Hodel, Agins[21],

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[19]Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[20]Lucas v. South Carolina Coastal Council, supra, at 112 S.Ct. 2891.

[21]Agins v. City of Tiburon, 447 U.S. 261, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

MacDonald, and Williamson County cases, a Plaintiff's claim is ripe, and a regulatory taking has occurred when, but not until, the government makes a final decision that takes all economically viable use of the property and fails to compensate the Plaintiff for the taking. The final decision of the State in this case did not occur until 1991 when the state archaeologist refused to disinter and rebury the ancient human remains. At that time in 1991, but not until then, was the case ripe for review or was there a taking. The majority decision of the Iowa Supreme Court erred in failing to find that the taking in this case occurred in 1991 which entitles these Plaintiffs to just compensation.

The majority decision of the Iowa Supreme Court incorrectly established 1978 as the date of ripeness and the date of taking, based on the premise that the Ancient Human Remains statutes were passed in 1976 and 1978. The effect of establishing 1978 as the ripeness and the taking date is to preclude all existing property owners in the state from receiving any compensation for a regulatory taking under these statutes after 1983, since there is a five year statute of limitations[22] on an action for damage to real property. All claims and actions for a regulatory taking by existing property owners under these statutes brought after 1983 would be improperly barred by the ruling of the majority decision.[23]

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[22]Section 614.1(4), Code of Iowa.

[23]As previously discussed, the majority decision of the lower court precludes all purchases of land after 1978 from receiving just compensation for a regulatory taking under these ancient human remains statues.

The majority decision of the Iowa Supreme Court is in violation of the Fifth Amendment which guarantees just compensation for inverse condemnation. The guaranty of just compensation comes from that self-executing Constitutional provision. "[I]n the event of a taking, the compensation remedy is required by the Constitution."[24]

The majority decision of the Iowa Supreme Court is also contrary to the general principle that an action for inverse condemnation accrues when the taking is complete. The First English case recognizes that an inverse condemnation occurs at the point of time when the regulation goes to the extent that all economically viable use of the property is taken. This Court in the First English case stated that a property owner is entitled to just compensation in the event or when the "government action that works a taking" occurs.[25]

"Generally, a cause of action for inverse condemnation accrues for limitation purposes, when the taking is complete, though the precise time when the taking takes place may depend upon the facts and circumstances of each case."[26] Also, under the "discovery rule" a cause of action does not accrue until a claimant knows or should reasonably know of

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[24]First English Evan. Luth. Ch. v. Los Angeles Cty., supra at 107 S.Ct. 2386.

[25]482 U.S. at 316, 107 S.Ct. at 2386.

[26]54 C.J.S. Limitation of Actions §176, p. 229.

the existence of his claim.[27] The Plaintiffs did not know nor should have reasonably known that the state archaeologist would make a significant find of ancient human remains on Lot 15 and refuse to allow them to be disinterred and reburied, until that action occurred in 1991. Under the "discovery rule" the Plaintiffs' cause of action in this matter accrued in 1991.

Under the Ancient Human Remains statutes in this case there was no final decision until the state archaeologist refused to disinter and rebury the remains in 1991. The State contemporaneously in 1991 denied the Plaintiffs any compensation for this taking. It was at this time in 1991, but not until this time in 1991, that (1) this matter was ripe for judicial action, (2) that a taking occurred, and (3) the statute of limitations for Plaintiffs bringing an inverse condemnation action began to run.

Amplification from this Court is needed to clarify and confirm the rule that in reference to a regulatory taking that:

1. A taking does not occur until a final decision implementing an enabling statue is made by the government which results in a taking of all economically viable use of the property, for which the government refuses to provide just compensation.
2. An action is not ripe for judicial consideration until a final decision is made by the government which results in a taking of all economically

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[27]The Iowa Supreme Court has recognized the discovery rule in numerous situations. See, Milluright v. Romer, 322 N.W.2d 30 (Iowa 1982); Baines v. Blenderman, 223 N.W.2d 199 (Iowa 1974); Brown v. Ellison, 304 N.W.2d 197, 200-201 (Iowa 1981); Vacura v. Plott, 666 F.2d 1200 (8th Cir. 1981).

viable use of the property, for which the government refuses to provide just compensation.

3. An action for inverse condemnation concerning a regulatory taking accrues under statutes of limitations when a final decision made by the government implements an enabling statute which results in a taking, for which the government refuses to provide just compensation.

The taking in this case occurred in 1991. It was at that same time that Plaintiffs' action accrued and was ripe for judicial consideration. These Plaintiffs are entitled to just compensation for this regulatory taking.

II. A RULE IS NEEDED TO ESTABLISH THAT THERE IS A DIFFERENCE BETWEEN A STATUTE THAT IMMEDIATELY AND DIRECTLY REGULATES PROPERTY AND AN ENABLING STATUTE THAT MAY IN THE FUTURE BE IMPLEMENTED TO REGULATE PROPERTY

There is a distinction between statutes that immediately and directly regulate property such as in the Lucas case, and enabling statutes as in this case that, if implemented, may be used to regulate property. In the Lucas case the 1988 South Carolina statute in question immediately and directly regulated the Lucas property to the extent that it took all economically viable use from that property.

The Court of Claims in the case of Formanek v. United States[28] dealt with an enabling statute. In the Formanek case the Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §1334 was passed prior to Mr. Formanek's purchase of the property in question. A botanist for the DNR's Natural Heritage Program studied the Formanek property for a period of time, and thereafter determined that the property contained a calcareous fen plant community of ecological significance that should be preserved. The U.S. Corp. of Engineers then denied Mr. Formanek a permit that would have allowed him to develop this land lying within the Minneapolis-Saint Paul, Minnesota Metropolitan area. The Court in awarding Mr. Formanek just compensation ruled that the "permit denial constituted a taking under the Fifth Amendment for which the public, and not the individual property owner, must bear the burden."[29]

Our present case, the Formanek, Keystone, Hodel, MacDonald and Williamson County cases involve enabling statutes. A rule is needed to establish that there is a difference between enabling statutes and statutes that immediately and directly regulate a property. That rule needs to provide that a regulatory taking occurs when, but not until, the implementation of the enabling statute against the property deprives the owner of all its economically viable use.

Under such a rule these Plaintiffs are entitled to just compensation for this regulatory taking.

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[28]26 Ct.Cl. 332 (1992).

[29]26 Ct.Cl. at 341.

III. THIS COURT SHOULD ACKNOWLEDGE THE RIGHT TO ASSIGN AN INVERSE CONDEMNATION CLAIM

In this case the Plaintiffs refunded the purchase price to Dr. Fleming and took back Lot 15. In his Quit Claim Deed to the Plaintiffs, Dr. Fleming conveyed all his right, title, interest, estate, claim and demand in Lot 15. Both the majority and dissenting opinions of the lower court, without discussion of the issue, correctly recognized that the Plaintiffs had been assigned Dr. Fleming's inverse condemnation action, and are entitled to pursue this inverse condemnation case.

Generally, interests in real property, whatever their extent or nature may be, are assignable.[30] Also, a right of action for injury to real property is assignable.[31] The Iowa Supreme Court has held that an assignment transfers to the assignee the assignor's entire interest or rights in property.[32]

This Court in the Spiller case[33] held that an action arising from wrongs causing injury to real or personal property, or from torts by which an estate, real or personal, has been injured, diminished or damaged, may be assigned. The Spiller case involved recovery for reduction in the value

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[30]6A C.J.S. Assignments §13, 6 AmJur2d Assignments §§23-26.

[31]6A C.J.S. Assignments §39, 6 AmJur2d Assignments §§41 and 44.

[32]Padzensky v. Kinzebaw, 343 N.W.2d 467, 471 (Iowa 1984); Kintzel v. Wheatland Mutual Insurance, 203 N.W.2d 799, 806 (Iowa 1973); Wiere v. The City of Davenport and Plummer, 11 Iowa 49 (1860).

[33]Spiller v. Atchison T. & S.F.R. Co., 253 U.S. 117, 64 L.Ed. 810, 80 S.Ct. 466 (1920).

of cattle due to excessive freight charges. That action was assigned to a cattlemen's association for collection of reparations before the Commerce Commission. This Court held that assignment of the action to recovery for the reduction in value to the cattle was valid and proper.

Likewise, the assignment of an action in inverse condemnation for the damage to real property is proper and valid. The validity of the assignment of an inverse condemnation should be affirmed by this Court. The Fifth Amendment provides that private property shall not be taken for public use without just compensation. There is no prohibition to assigning the right to recover just compensation.

The Fifth Amendment ensures that just compensation will be paid in the event of an inverse condemnation, whether or not the right to that compensation has been assigned. The right to bring an inverse condemnation action is a result of "the self-executing character of the constitutional provision with respect to compensation . . ."[34]

"The form of the remedy did not qualify the right (of inverse condemnation). It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States."[35]

"[T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by

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[34]United States v. Clarke, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980).

[35]Jacobs v. United States, 290 U.S. 13, 16, 54 S.Ct. 26, 27, 78 L.Ed. 143 (1933).

the Constitution."[36] "Thus, government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)."[37]

Since the Constitution guarantees and requires payment for a taking, the assignment of an inverse condemnation should not prevent payment for the taking. If the right to recover just compensation were not assignable, the government would get a windfall by avoiding payment in situations as presented in this case. The government should pay for what it has taken, whether or not the payment is assigned to another party. In our present case the Plaintiffs assumed ownership of Lot 15 as well as being assigned all of Dr. Fleming's right, title, interest, estate, claim and demand in Lot 15. The Plaintiffs clearly are properly entitled to stand in the shoes of Dr. Fleming in this inverse condemnation action seeking just compensation for the regulatory taking of Lot 15.

This court should acknowledge the right to assign an inverse condemnation action.

CONCLUSION

The lower court in conflict with the previous decisions of this Court in the Lucas, Keystone, Hodel, First English, MacDonald and Williamson County cases erred in failing to rule that a regulatory taking occurs at the point of time, but

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[36]First English Evan. Luth. Ch. v. Los Angeles Cty., 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987).

[37]Id., at 315, 107 S.Ct. at 2386.

not until, the impact of government action takes all the economically viable use of the property. Amplification is needed to clarify that a regulatory taking under an enabling statute occurs, accrues and is ripe at the point of time, but not until, the statute is implemented to impact the property to the extent that all economical use of the property is taken. A rule is needed to establish the difference between an enabling statute and one that immediately and directly regulates property. A rule is also needed to establish that an inverse condemnation claim is assignable. The erroneous ruling of the lower court needs to be reversed so that it will not be precedent to deny just compensation to property owners who purchase property after an enabling statute is passed, but prior to the statute being implemented against the property. The erroneous ruling of the lower court needs to be reversed to allow these Plaintiffs just compensation for the regulatory taking in this case.

Petitioners pray that Certiorari be granted.

Dated: December 19, 1994.

Respectfully submitted,

ROBERT W. GOODWIN of
GOODWIN LAW OFFICE, P.C.

Attorney for Petitioners
ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.

APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 176/93-302

Filed July 27, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.,
Appellants,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

Appeal from district court grant of summary judgment.

AFFIRMED.

Robert W. Goodwin of the Goodwin Law Office, Ames, for appellants.

Bonnie J. Campbell, Attorney General, Elizabeth M. Osenbaugh, Deputy Attorney General, and Michael H. Smith, Assistant Attorney General, for appellee.

Considered by McGiverin, C.J., and Carter, Lavorato, Snell, and Ternus, JJ.

LAVORATO, Justice.

The issue in this case is whether the district court properly concluded as a matter of law that the plaintiffs were not entitled to compensation on a regulatory taking theory for land they own. We think the district court was correct and we affirm.

The plaintiffs--Erben A. Hunziker, Donald M. Furman, R. Friedrich and Sons, Inc., and Buck Construction Company, Inc.--are land developers. In May 1988 they purchased a fifty-nine acre tract of farm land to develop. The plaintiffs platted the tract as the Second Addition, Northridge Parkway Subdivision.

In May 1990 the plaintiffs sold lot 15 in the addition for $50,000. The buyer--Dr. Jon Fleming--planned to build a home on the lot.

In April 1991 the state archaeologist learned that lot 15 has a Native American burial mound on it. The state archaeologist probed lot 15 and found some human bones. Studies indicated that the burial mound on lot 15 was made between 1000 and 2500 years ago by Native Americans of the Woodland Period.

Pursuant to Iowa Code section 305A.9 (1991), the state archaeologist prohibited disinterment of the burial mound and required a buffer zone around the mound to ensure its protection. Given the size of lot 15, the location of the mound near the center of the lot, and the need for the buffer zone, construction of a house on lot 15 was not feasible. Because of (1) the state archaeologist's determination, (2) the prohibition against disinterment,

and (3) the buffer zone requirement, the city refused to issue a building permit for lot 15.

The plaintiffs refunded the purchase price to Dr. Fleming and took the lot back. The plaintiffs then brought this mandamus action, alleging the State's action amounted to a regulatory taking without compensation. The plaintiffs asked the court to enter a writ of mandamus commanding the State to condemn lot 15 and provide them just compensation for it.

Both parties moved for summary judgment. The district court granted the State's motion and denied the plaintiffs' motion. The court also overruled the plaintiffs' subsequent motions. The plaintiffs appealed.

I. Scope of Review.

Because mandamus is an equitable action, our review is de novo. Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 663 (Iowa 1992). Mandamus is a procedural device to compel condemnation when there has been a taking of private property for public use without just compensation. Phelps v. Board of Supervisors, 211 N.W.2d 274, 276 (Iowa 1973). Mandamus is limited to determining

> whether a factual issue exists that would permit a condemnation commission or a jury on appeal of an award to find an intrusion that produced a measurable decrease in the property's market value. The mandamus court may find the evidence insufficient as a matter of law to compel the summoning of a condemnation commission, but that court is simply not called upon to rule as a matter of law that a taking has occurred. To do so would create an undesirable issue preclusion

> problem in a later trial of a condemnation proceeding. It is for the condemnation commission or trial jury to fix the loss of value, if any, suffered by the property owner.

Fitzgarrald, 492 N.W.2d at 663-64. So our task here is to determine whether the district court correctly determined there was no factual issue that would permit a finding of a compensable intrusion. This, of course, is the same question posed by a motion for summary judgment. Hasbrouck v. St. Paul Fire & Marine Ins. Co., 511 N.W.2d 364, 366 (Iowa 1993).

II. Whether There Was a Factual Issue That Would Permit a Finding of a Compensable Intrusion.

In its summary judgment motion, the State urged, among other things, that the plaintiffs never had a vested property right under statutory or common law to build a house on an ancient burial mound. For this reason, the State argued, no regulatory taking occurred. The district court agreed and entered summary judgment in favor of the State.

A. Applicable law. The Fifth Amendment to the federal Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This provision of the Fifth Amendment is made binding on the states through the Fourteenth Amendment to the federal Constitution. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160, 101 S. Ct. 446, 450, 66 L. Ed. 2d 358, 364 (1980). An Iowa Constitutional provision similarly provides that "[p]rivate property shall not be taken for public use without just compensation first being made. . . ." Iowa Const. art. I, § 18.

"Taking," for purposes of the federal and Iowa constitutional right of just compensation,

> does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.

Phelps, 211 N.W.2d at 276.

Here the plaintiffs' claim for compensation is based on what has been referred to as inverse condemnation. Inverse condemnation is

> a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.

United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127, 1130, 63 L. Ed. 2d 373, 377 (1980).

Land-use regulation does not effect a taking requiring compensation if it substantially advances a legitimate state interest. Lucas v. South Carolina Coastal Council, 505 U.S. ____, ____, 112 S. Ct. 2886, 2897, 120 L. Ed. 2d 798, 818 (1992). There are two exceptions. When the regulation (1) involves a permanent physical invasion of the property or (2) denies the owner all economically beneficial or productive use of the land, the State must pay just compensation. Id. at ____, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821; Iowa Coal Mining Co. v. Monroe County, 494 N.W.2d 664, 670 (Iowa 1993).

When the regulation denies the owner all economically beneficial or productive use of the land, the State--under limited circumstances--may resist payment of compensation. The limited circumstances include those instances where it can be shown that the property owner's "bundle of rights" never included the right to use the land in the way the regulation forbids. Lucas, 505 U.S. at ____, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820; Iowa Coal Mining Co., 494 N.W.2d at 670. Whether or not the property owner's "bundle of rights" included the right to use the land in the way the regulation forbids is to be determined under state nuisance and property law. Lucas, 505 U.S. at ____, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821.

B. Analysis. The Iowa legislature passed Iowa Code section 305A.7 in 1976. In 1978 the Iowa legislature passed Iowa Code sections 305A.9 and 716.5. Section 305A.7 provides in part:

> The state archaeologist shall have the primary responsibility for investigating, preserving and reinterring discoveries of

> ancient human remains. For the purposes of [this section] ancient human remains shall be those remains found within the state which are more than one hundred fifty years old. . . .

1976 Iowa Acts ch. 1158, § 7 (renumbered as Iowa Code section 263B.7 (1993)).

Section 305A.9 provides:

> The state archaeologist shall have the authority to deny permission to disinter human remains that the state archaeologist determines have state and national significance from an historical or scientific standpoint for the inspiration and benefit of the people of the United States.

1978 Iowa Acts ch. 1029, § 26 (renumbered as Iowa Code section 263B.9 (1993)).

Section 716.5(2) provides that a person commits criminal mischief in the third degree when the person

> [i]ntentionally disinters human remains that have state and national significance from an historical or scientific standpoint for the inspiration and benefit of the United States without the permission of the state archaeologist.

1978 Iowa Acts ch. 1029, § 50.

The plaintiffs do not challenge the findings of the state archaeologist that he made a significant find. Nor do they challenge the authority of the state archaeologist to designate an area as a significant find and to preserve that area pursuant to sections 305A.7 and 305A.9.

The plaintiffs, however, contend that if, in so preserving the find, the state archaeologist deprives the landowner of all beneficial use of the land--as in the case of lot 15--there has been a regulatory taking for which the owner is entitled to compensation. The plaintiffs interpret Lucas as requiring the State to show that even without sections 305A.7, 305A.9, and 716.5(2), the plaintiffs would not--under Iowa property law--have been able to construct a family residence on lot 15. The plaintiffs argue that because the State cannot make such a showing there has been a taking for which they should be compensated.

In addition, the plaintiffs believe that here a "taking" did not occur until the state archaeologist (1) made a significant find and (2) took action denying permission to disinter the human remains on lot 15. Because this did not happen until after the plaintiffs purchased the land, the plaintiffs argue there was a "taking" at that time. In support of their argument, the plaintiffs rely on language in Lucas that regulatory takings can happen from a law or decree and that such regulatory action may well have the effect of eliminating the land's only economically productive use.

Apparently, then, the plaintiffs concede the sections in question and the state archaeologist's determination with respect to lot 15 advance a legitimate state interest. Whether there has been a taking in the Lucas sense depends on two things. The first is whether the plaintiffs are correct that the State must show that, without sections 305A.7, 305A.9, and

716.5(2), the plaintiffs would not under Iowa property law have been able to construct a family residence on lot 15. The second is whether the taking occurred when the plaintiffs claimed it did.

We do not interpret Lucas as restrictively as the plaintiffs do. Section 305A.7 was in existence and therefore part of Iowa's property law some twelve years before the plaintiffs purchased the land in question. Sections 305A.9 and 715.5(2) were in existence and therefore part of Iowa's property law some ten years before the plaintiffs purchased the land in question. So the "bundle of rights" the plaintiffs acquired by their fee simple title did not include the right to use the land contrary to the provisions of those three Iowa Code sections. Any prohibited use of lot 15 is directly attributable to the provisions of these three Code sections. The plaintiffs took title to the land in question subject to the provisions of these sections. These sections and their resulting prohibitions concerning the use of land ran--so to speak--with the land.

In addition, in Lucas, the regulation in question was passed after the plaintiffs acquired title. In contrast, here the statutes--sections 305A.7, 305A.9, and 715.5(2)--were in existence at least a decade before the plaintiffs acquired title. This is an important distinction.

More important, implicit in the Supreme Court's "bundle of rights" analysis is that the right to use the land in the way contemplated is what controls. Here, when the plaintiffs acquired title, there was no right to disinter the human remains and build in the area where the remains were located. For that reason, there was no taking when the state archaeologist made the significant find and took action denying permission to disinter the human remains. We find

support for this conclusion in the following passage from Lucas:

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved . . . though we assuredly would permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title. . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 505 U.S. at ____, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821 (citations omitted) (emphasis added). Here, at the time the plaintiffs acquired title, the State, under existing

state law, could have prevented disinterment. This limitation or restriction on the use of the land inhered in the plaintiffs' title.

For all these reasons, there was--as a matter of law--no taking requiring payment of compensation. Because there was no fact issue on the issue of taking, the district correctly sustained the State's motion for summary judgment.

AFFIRMED.

All justices concur except Snell, J., who dissents.

SNELL, J. (dissenting).

I respectfully dissent.

This case is about whether the State of Iowa has the right to take a person's land and not pay for it. The majority opinion establishes the principle that the state can do that whenever it finds human bones over 150 years old buried on land that the state archaeologist declares has historical significance. I believe this is not the law of Iowa nor should it be.

The Fifth Amendment through the Fourteenth Amendment of the United States Constitution provides that the government shall not take private property for public use without just compensation. Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 111 (1980); Bakken v. City of Council Bluffs, 470 N.W.2d 34, 36 (Iowa 1991).

Iowa law has recognized the principle of inverse condemnation, when the government does not actually condemn property but its action amounts to the same thing. Scott v. City of Sioux City, 432 N.W.2d 144, 145 n. 1 (Iowa 1988). By establishing that an inverse condemnation has occurred, a property owner may recover just compensation. United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127, 1130, 63 L. Ed. 2d 373, 377 (1980). In this mandamus action plaintiffs do not seek to prevent the state from preserving the burial mound site for historical or scientific benefit. They claim only that they are entitled to compensation for the economic loss that befalls them from the state taking their property. I find their claim to be just and supported by law.

The trial court granted the State's motion for summary judgment and the majority affirms on the ground that plaintiffs cannot prevail as a matter of law. I believe this result occurs from a misapplication of the statutory and common law. I would reverse the decision granting the State's summary judgment and remand for entry of an order sustaining plaintiffs' summary judgment motion.

We have recognized the inevitable danger to private property that exists if the "just compensation" requirements of the Fifth Amendment to the federal Constitution and article I, section 18 of the Iowa Constitution could be circumvented through the guise of police power regulation. Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 381-82 (Iowa 1975). Although not every police power regulation that restricts some beneficial use of property creates a compensable taking the frustration of investment-backed expectations may constitute a taking for which compensation is due. Fitzgarrald v. City of Iowa City, 492, N.W.2d 659, 665 (Iowa 1992) (citing numerous cases).

Lot 15, the burial mound area, is part of an investment-backed expectation of plaintiffs in developing a 59-acre tract for homes. It had been sold for $50,000 and is now worth $100 because nothing can be built on it. The State argues that the plaintiffs caused their own loss by buying property without recognizing a burial mound was on it that they could not use for home development. The State also promotes the idea that plaintiffs are undeserving of compensation because they made so much money selling other lots in the 59-acre tract that their loss of Lot 15 is but a fraction of their investment and therefore "de minimus." This patronizing view of entrepreneurship is unfounded in law and economic reality.

The majority result is premised on the law quoted from Lucas v. South Carolina Coastal Council, 505 U.S. ____, ____, 112 S. Ct. 2886, 2899, 120 L. Ed. 2d 798, 820 (1992), and our state statutes. The language of the Lucas case relied upon is dictum expressing an undefined exception to the general rule that compensation must be paid for a taking. The holding of the Lucas case sustained the landowner's claim that a taking had occurred and rejected the State's argument that it owed no compensation because it was for the public benefit. The law established by Lucas actually supports the claim of plaintiffs in the case at bar. The Supreme Court in Lucas said:

> In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.

Id. at ____, 112 S. Ct. at 2893, 120 L. Ed. 2d at 812.

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. at ____, 112 S. Ct. at 2895, 120 L. Ed. 2d at 815.

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become a part of our constitutional culture.

Id. at ____, 112 S. Ct. at 2900, 120 L. Ed. 2d at 820.

> As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation . . . ."

Id. at ____, 112 S. Ct. at 2901, 120 L. Ed. 2d at 823 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164, 101 S. Ct. 446, 452, 66 L. Ed. 2d 358, 367 (1980)).

The prohibition by the State of Iowa from using the burial mound in the instant case is a complete taking because there is no practical use of it left to the plaintiffs. It is more insidious than zoning laws that we have held to effect a taking when they deny the economically viable use of the land. See Agins, 447 U.S. at 260, 100 S. Ct. at 2141, 65 L. Ed. 2d at 112; Osborn v. City of Cedar Rapids, 324 N.W.2d 47, 474 (Iowa 1982); Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979). It is pernicious because there is virtually no notice to a landowner of the State's claim and no opportunity to review the government action or appeal to the courts.

The Iowa statutes cited as preventing full ownership of land containing a burial mound give no notice of the State's inchoate claim of authority to deny compensation while prohibiting use. See Iowa Code §§ 263B.7, 263B.9, and 716.5(2) (1993). Nor do they state or even imply that land with a burial mound bears a perpetual cloud on the title removable only by authority of the state archaeologist. Section 305A.9, giving the state archaeologist authority to deny permission to disinter human remains, is not a self-executing statute creating a covenant running with the land. By its own terms the statute is activated only by an application for permission to disinter. Moreover, there is no indication from the language of these statutes that the legislature intended to take property for historical or scientific inspiration without paying for it.

In this case, a dead bones doctrine has risen from the soil, like a phoenix, to consume the live marrow of land ownership. The history surrounding these ancient bones should be preserved by granting compensation for its resurrection.

APPENDIX B

B 1

IN THE SUPREME COURT OF IOWA
No. 93-302

O R D E R

ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.,
Appellants,
vs.
STATE OF IOWA,
Appellee.

After consideration by the court, en banc, appellants' petition for rehearing in the above-captioned case is hereby overruled and denied.

Dated this 21st day of September, 1994.

THE SUPREME COURT OF IOWA

Arthur A. McGiverin
Chief Justice

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FILED
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No. 94-1077

In The

Supreme Court of the United States

October Term, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.,

Petitioners,

vs.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the Iowa Supreme Court's decision construing Iowa's ancient burial protection statutes as pre-existing limitations on Petitioners' property rights presents a special and important question of federal law?

2. Whether the Iowa Supreme Court's recognition of pre-existing statutory limitations on Petitioners' property rights is consistent with *Lucas v. South Carolina Coastal Council* and other decisions of this Court?

3. Whether an issue of claim assignability is properly presented by the petition of developer-landowners whose standing to allege a regulatory taking was unchallenged below?

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No. 94-1077

In The

Supreme Court of the United States

October Term, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.,

Petitioners,

vs.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

The Respondent State of Iowa respectfully opposes the Petition for Writ of Certiorari to review the opinion and judgment of the Iowa Supreme Court entered in the above-captioned case on July 27, 1994.

OPINIONS BELOW

The Iowa Supreme Court issued its decision on July 27, 1994. The decision is published as *Hunziker v. State,*

519 N.W.2d 367 (Iowa 1994). The decision denying rehearing was issued September 21, 1994. The decisions are reprinted in appendices to the Petition.

JURISDICTION

The Petition invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

A millennium or more before Iowa was admitted to statehood, Native American survivors carefully interred their deceased in a burial mound on a bluff overlooking a creek. The land surrounding the mound is now in a residential subdivision developed by Petitioners at the edge of the City of Ames, Iowa.

For more than 150 years Iowa statutes have prohibited disinterment of human remains without lawful authority. Iowa Code section 716.5(1) makes it a crime to disinter human remains from a burial site without lawful authority. This statute was derived from Section 88 of "An Act defining Crimes and Punishments," approved January 25, 1839, and compiled in *Laws of Iowa, 1838-39*, p. 75.

In 1978 the Iowa General Assembly enacted a more specific limitation authorizing the State Archaeologist to permit disinterment at ancient burial sites and expressly making disinterment of ancient human remains without the State Archaeologist's permission a crime. Chapter

1029, §§ 6, 50, 1978 Iowa Acts, adding Iowa Code section 305A.9 (recodified as 263B.9) and subsection 716.5(2).

A decade later, in 1988, Petitioners bought an undeveloped 59-acre parcel including a wooded hillside at the edge of Ames. They subdivided the parcel into 124 residential lots. The developers platted the lots in a configuration which placed the ancient human grave on the only buildable part of one lot (Lot 15). The grave is a visually discernable circular mound more than 3 feet high at the center with a diameter of about 34 feet occupying about two one-hundredths (.02) of an acre on a bluff top overlooking a creek. Lot 15 comprises four one-tenths (.4) of an acre. The Iowa State Archaeologist was not aware of the existence of the mound. The developers did not recognize it as a human burial mound.

Shortly after the developers sold the lot for a residential building site, a person who knew of the mound observed survey stakes nearby and reported that an ancient burial mound was likely to be destroyed. The report led to a cooperative investigation by the State Archaeologist and the developers. The State Archaeologist determined that the mound is a human burial mound in good condition. He further determined that the mound contains ancient human remains in good condition after burial between 1,000 and 2,500 years ago. The State Archaeologist also determined that the ancient human remains have significant archaeological value and should not be disturbed.

The circumstances leading to discovery of the ancient grave, the site investigation, and the reasons for prohibiting disinterment are set forth in "Archaeological Investigations and Osteological Analyses at 13SR18 and 13SR19, Northridge Subdivision, Ames, Story County, Iowa," (Exhibit 1 attached to State's statement of material facts in support of its summary judgment motion in the trial court).

The developers rescinded the sale of Lot 15 and sued on their own behalf for a writ of mandamus compelling the State to condemn the lot. In response to the State's discovery requests, the developers admitted that the State Archaeologist reasonably applied the Iowa burial protection statutes in determining that the ancient human remains should not be disinterred. The developers likewise conceded that the statutes and the Archaeologist's determination advance legitimate state interests. The developers did not challenge the findings of the Archaeologist or his authority. Plaintiff's Responses to State's Requests for Admission Nos. 6 and 7; *Hunziker v. State*, 519 N.W.2d 367, 370 (Iowa 1994) (Petition, Appendix "A" at page A-8).

The trial court granted the State summary judgment on the ground that the developers never had a right to build a house on an ancient grave as Iowa statutes expressly regulating disinterment of ancient human burials were enacted before the developers bought the 59-acre parcel. Petitioners acquired title in 1988 subject to pre-existing limitations. No compensable taking occurred. The Iowa Supreme Court affirmed on the same ground.

REASONS TO DENY THE PETITION

I. THE IOWA SUPREME COURT'S DECISION CONSTRUING IOWA'S ANCIENT BURIAL PROTECTION STATUTES AS PRE-EXISTING LIMITATIONS ON PETITIONERS' PROPERTY RIGHTS DOES NOT PRESENT A SPECIAL AND IMPORTANT QUESTION OF FEDERAL LAW.

Petitioners ask the Court to review an esoteric species of state statute which has very little regulatory impact on private property. Litigation involving regulation of ancient human burials on private property is rare. In addition to the opinion below, there appears to be only one other published opinion of any state appellate court concerning regulation of ancient human burial sites on private property. *Thompson v. City of Red Wing*, 455 N.W.2d 512 (Minn. App. 1990) (ordering dismissal of unripe inverse condemnation claim).

The impact of Iowa's ancient human burial protection law is necessarily limited by its narrow scope. It does not prohibit disinterment of artifacts or every ancient human bone which might be encountered. Reasonably applied here, as conceded by the petitioners, the statute prohibits disturbance of a grave occupying two one-hundredths (.02) of an acre or only three ten-thousandths (.0003) of the 59-acre parcel which the developers bought and subdivided.

The developers lost the sale of one lot out of 124 because they platted the lots in a configuration which inadvertently placed the mound on the only buildable part of a single lot. Their financial loss was insignificant in relation to their receipts from the sale of the other 123

lots. Compared, for example, with the geographical reach of laws limiting development of beaches and wetlands, the land areas affected by ancient burial protection laws are isolated and minute. The statute does not purport to authorize public access to ancient graves on private property. It only authorizes the State Archaeologist to prohibit disinterment. The relevant text is quoted in the opinion below (Petition, Appendix at p. A-7). This statute does not authorize any "land grab" that could sweep across a state. *See Stevens v. Cannon Beach*, ___ U.S. ___, 114 S.Ct. 1332, 1335, 127 L.Ed.2d 679, 682 (1994) (Scalia, J., dissenting from denial of certiorari).

II. THE IOWA SUPREME COURT'S RECOGNITION OF PRE-EXISTING STATUTORY LIMITATIONS ON PETITIONERS' PROPERTY RIGHTS IS CONSISTENT WITH *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL* AND OTHER DECISIONS OF THIS COURT.

The Iowa Supreme Court properly distinguished this case from *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). After Lucas bought two expensive beach-front lots the legislature enacted a statute enabling the coastal council to prohibit beach-front building construction. In contrast, Petitioners here bought undeveloped land a decade after enactment of Iowa's statutes which specifically regulate disinterment of ancient burials.

Additionally, Petitioners first acquired title to the property more than a century and a half after enactment of Iowa's laws making it a crime to disinter human remains. The current disinterment prohibition in Iowa

Code subsection 716.5(1) is derived from the 1839 enactment of the territorial legislature prohibiting disinterment. Section 88 of "An Act defining Crimes and Punishments," approved January 25, 1839, and compiled in *Laws of Iowa, 1838-39*, p. 75. Thus, the general disinterment limitation was part of the criminal law of Iowa before the United States opened the land in issue for public sale.

The grave on Petitioners' land is like the earthquake fault zone mentioned in *Lucas*, ___ U.S. ___, 112 S.Ct. at 2900, 120 L.Ed.2d at 821. Here, Petitioners conceded below that pre-existing statutes were reasonably applied to a recently discovered condition of the land. The State Archaeologist did not prohibit a use that was previously permissible under relevant property principles.

Recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. *Lucas*, ___ U.S. ___, 112 S.Ct. at 2901, 120 L.Ed.2d at 822. The Iowa Supreme Court properly applied *Lucas*. In contrast to the circumstances in *Lucas*, here the limitation on the use of the land "inhered in the plaintiff's title." *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994) (Petition, Appendix "A" at pp. A-10, A-11).

Lucas was decided recently. State appellate courts have had little opportunity to apply it. The facts here are a far cry from the facts in *Lucas*. The Iowa Supreme Court's reasonable application of *Lucas* in this case does not provide any reason to revisit *Lucas*.

The Petition also erroneously contends that the decision below conflicts with a line of pre-*Lucas* decisions rejecting facial challenges to statutes and ordinances on grounds of lack of finality. The Petition (at page 18) inaccurately states that the Iowa Supreme Court "incorrectly established 1978 as the date of ripeness and the date of taking, based on the premise that the Ancient Human Remains statutes were passed in 1976 and 1978." The Iowa Supreme Court's opinion contains no such holding, and no suggestion that the statute could have been invalidated by a facial challenge at the time of its enactment.

Rather, as the trial court observed, Petitioners could have avoided loss by investigating the property more thoroughly before buying a woodland bluff for intensive residential development. Hunziker v. State, Iowa District Court for Story County, No. 34771-1091, November 4, 1992 Order (granting State's summary judgment motion) at page 16. If they wished to minimize their risk they could have done an inexpensive archaeological reconnaissance before platting their subdivision. The risk was small; their resulting loss is small.

III. ASSIGNABILITY OF A REGULATORY TAKING CLAIM IS NOT PROPERLY PRESENTED AS AN ISSUE BY THE PETITION OF DEVELOPER-LANDOWNERS WHOSE STANDING TO ALLEGE A REGULATORY TAKING WAS NOT CHALLENGED BELOW.

The Petition (at page–23) states that the Iowa Supreme Court's majority opinion, without discussion, correctly recognized that Petitioners had taken an assignment of their purchaser's inverse condemnation claim.

There was no need for the courts below to discuss assignment because the State never challenged Petitioners' standing to petition for a writ of mandamus compelling condemnation of the ancient burial mound.

Assignability of an inverse condemnation claim was never an issue in this litigation. Petitioners are trying to manufacture an issue that never existed on the undisputed facts below. A ruling by this Court that a regulatory taking claim is assignable would not help Petitioners whose only arguable assignment was an assignment back from the purchaser who bought Lot 15 from them. This non-issue cannot now be a reason to grant the Petition.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 94-1077

In the
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ERBEN A. HUNZIKER, DONALD M. FURMAN,
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BUCK CONSTRUCTION COMPANY, INC.,
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v.

STATE OF IOWA,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of Iowa

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 94-1077

In the

Supreme Court of the United States

October Term, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN,
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BUCK CONSTRUCTION COMPANY, INC.,
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STATE OF IOWA,
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Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide, including donors from the State of Iowa. Policy for PLF is set by a Board of Trustees

composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Attorneys for PLF have participated in numerous land use takings cases before this Court and other courts representing both amicus curiae and property owners. For example, PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992), and PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[1]

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property

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[1] PLF has also participated as amicus curiae in other takings cases before this Court such as in *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994); *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 447 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981); and *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In 1976 and 1978, the Iowa Legislature enacted statutes governing significant findings of ancient human remains. Iowa Code §§ 305A.7, 305A.9, and 716.5. These statutes can dramatically impact the ability of property owners to make use of their land--although the existence of the impact may not have been apparent in 1976 or 1978--and, indeed, in most cases may not become apparent for many years hence. Under the decision in this case below, once the impact of the statutes is discovered, the current owner may have no legal recourse whatsoever for any relief.

The statutes enable Iowa's state archaeologist, after making a significant find of ancient human remains, to follow two possible courses of action. The state archaeologist may allow the disinterment of remains from the property on which they were discovered for their subsequent reinterment in a cemetery established specifically for that purpose, or the state archaeologist may refuse to allow reinterment of the remains elsewhere, in which case the state archaeologist could prohibit any use of the property on which significant human remains were discovered which would disturb them.

On May 1, 1990, the petitioners, Erben A. Hunziker, Donald M. Furman, R. Friedrich and Sons, Inc., and Buck Construction Company, Inc., who are land developers, sold to Dr. Jon Fleming a lot in a 59-acre tract of farmland which they platted for development. Dr. Fleming planned to build a home on the lot. In April, 1991, just before excavation

began on the home's basement, the state archaeologist learned that Dr. Fleming's lot had a Native American burial mound on it. The state archaeologist probed the lot and found some human bones. Later studies concluded that the burial mound was made between 1,000 and 2,500 years earlier by Native Americans of the Woodland Period, a significant find. Before the probes neither petitioners nor Dr. Fleming were aware of the burial mound. *Hunziker v. State of Iowa*, 519 N.W.2d 367, 368 (Iowa 1994).

Pursuant to the ancient human remains statutes, the state archaeologist prohibited disinterment of the burial mound and required the establishment of a 50-foot buffer zone around the 34-foot diameter burial mound. On April 30, 1991, Dr. Fleming received a letter from the state archaeologist warning him of the criminal penalties for disinterment of the remains. Because of the size of the lot and the situation of the burial mound with its surrounding buffer zone near the center of the lot, construction of a house on the lot was no longer feasible. Indeed, because of the ancient human remains statutes and the actions of the state archaeologist, the City of Ames refused to issue a building permit for the lot. *Id.*, Petition for Writ of Certiorari (Pet.) at 3.

Petitioners refunded Dr. Fleming his purchase price and architectural fees incurred for development of the lot. Dr. Fleming in turn quitclaimed all his interest in the lot to petitioners, including the right to sue for a taking. Petitioners then offered the state archaeologist to move the mound and its remains, at their expense, to a site in a wooded city park, but the state archaeologist refused the offer. The state archaeologist also refused to disinter the remains and reinter them in the special cemetery established for that purpose. Petitioners then brought a mandamus action in state court, alleging that the state's action was a

regulatory taking of private property without just compensation. They sought a writ of mandamus commanding the state to condemn the lot and pay them just compensation for it. Both petitioners, plaintiffs below, and defendant moved for summary judgment, which the trial court granted the latter and denied the former. 519 N.W.2d at 368, Pet. at 3-4.

Petitioners appealed to the Iowa Supreme Court, which affirmed the trial court on a vote of four to one.[2] 519 N.W.2d at 371. The majority opinion cited *Lucas v. South Carolina Coastal Commission*, 120 L. Ed. 2d 798, as authority to deny petitioners compensation because their lot was purchased after the enactment of the ancient human remains statutes, which the court deemed part of the property law affecting title to all land in the state containing significant human remains by forbidding its development. 519 N.W.2d at 370-71. Under the court's reasoning, because both the statutes and the burial mound were in place before petitioners purchased the lot, the right to develop the lot was not one of their property interests, so they could not receive compensation for it. *Id.* at 371. The dissenting opinion also relied on *Lucas* but concluded that *Lucas* supported petitioners' claim. *Id. at* 372-73. The dissent reasoned that the mere passage of the ancient human remains statutes did not effect a taking. Rather, a regulatory taking occurred when the government applied the statutes to the lot in a manner that precluded all economically viable use of it. *Id.* at 373. The dissent also noted that Iowa Code § 305A.9, "giving the state archaeologist authority to deny permission to disinter human remains, is not a self-executing statute creating a covenant running with the land."

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[2] *Hunziker v. State of Iowa*, 519 N.W.2d 367.

There is no dispute in this case that all economically viable use of the property in question has been destroyed. The dispute is whether petitioners should be precluded from obtaining just compensation for the taking.

SUMMARY OF ARGUMENT

The denial of all economically beneficial use of property by a law or regulation is a categorical taking, and the Just Compensation Clause of the United States Constitution requires that states pay compensation when this occurs. The only exception, under *Lucas*, is when the restriction on use can be rationalized as an extension of pre-existing common law principles of property and nuisance. Presented with a categorical taking of petitioners' property, the Supreme Court of Iowa failed to analyze the responsible statutes in light of common law principles. Instead, the court held that the mere passage of the statutes--even though the statutes were not determined to have any effect on the property until more than a decade later--creates an exception to takings liability when the property was purchased after the statutes had passed. This holding conflicts with *Lucas*, violates the Just Compensation Clause, and effectively abolishes the right of subsequent purchasers to bring as-applied takings challenges to laws requiring government permission (such as variances, special use, or building permits) prior to the use of land.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THE SUPREME COURT OF IOWA IGNORED THE BACKGROUND PRINCIPLES OF IOWA'S COMMON LAW OF PROPERTY AND NUISANCE, IN VIOLATION OF THIS COURT'S REQUIREMENT

This case is an extreme example of the very situation this Court attempted to preclude by the decision in *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d at 821-22. Even though it is not disputed that all economically viable use of petitioners' property has been eliminated by application of the ancient human remains statutes, *see Hunziker*, 519 N.W.2d 370-71, the Supreme Court of Iowa excuses the state from a *per se* category of takings liability, solely on the basis that the state passed a law under its police powers. *Id.*

Lucas makes clear that the Just Compensation Clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment, requires that compensation be paid to property owners who suffer a loss of economically beneficial or productive use of their property, *unless their use of the land could have been enjoined in the courts as a private or public nuisance.*[3] The only laws passed by a state

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[3] This Court left open the possibility that other common law principles could be enlisted to avoid payment of compensation, primarily "to forestall ... grave threats to the lives and property of others." *Lucas*, 120 L. Ed. 2d at 821 n.16

(continued...)

that can deprive private citizens of all economic use of their property without payment of just compensation are laws that can be justified under the common law nuisance and property principles of that state, as it is "open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Lucas*, 120 L. Ed. 2d at 822.

This Court's use of common law principles as an external, objective yardstick with which to assess a state's liability was no accident. *See Lucas*, 120 L. Ed. 2d at 823 n.18. *Lucas* stressed the "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm" when such an extreme prohibition on private use is in force. 120 L. Ed. 2d at 814. This Court found such a limitation to be an "extraordinary circumstance" in which

> it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," ... in a manner that secures an "average reciprocity of advantage" to everyone concerned.

Lucas, 120 L. Ed. 2d at 814 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

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[3] (...continued)
(citations omitted). Obviously, more than a police power justification is required and recourse must be had to *preexisting* principles.

In the "extraordinary circumstance" of deprivation of all economically beneficial use, the self-interested determinations of a legislature cannot be controlling. Common law principles concerning property ownership and use, developed in the neutral, disinterested courts by private party adversaries, are a reliable safeguard against public confiscation of private property rights.[4] The state may make explicit the implications of these principles, but cannot legislatively alter these "background principles" that inhere in the title to property. *See Lucas*, 120 L. Ed. 2d at 821-22. State courts must analyze legislative enactments to ensure that they "do no more than duplicate the result that could be achieved in the courts," *id.*, else these courts are failing in their duty to prevent "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Supreme Court of Iowa deviated from this responsibility in a manner that, if allowed to stand, gives all state courts the means to render *Lucas* a nullity. Rather than determining whether the ancient human remains statutes can be considered an extension of preexisting, common law principles, the court in *Hunziker* instead proclaimed that, once enacted, these statutes *are* the background principles. 519 N.W.2d at 371. Thus, everyone who purchases land after the enactment of a regulation that *could possibly* be applied to their property is buying much less than "an estate

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[4] The only time the state can "inhere" limitations in the title to land itself must be when the land first enters the private domain. If the state places a covenant, condition, or restriction on the use of land before selling it to private parties, it has already in a sense "paid" for this limitation by accepting a lower purchase price on account of the limitation.

with a rich tradition of protection at common law." *Lucas*, 120 L. Ed. 2d at 814 n.7. They instead are purchasing title to land with a serious latent defect that can render the property worthless. If other courts follow the *Hunziker* decision, then there is no preventing the eventual elimination of the *per se* category of complete deprivation of economic use of property. Under *Hunziker*, all a state need do is pass a law authorizing localities to adopt property regulation that precludes all use of private property and then wait for the current generation of property owners to pass away. Inhering in the title would be the possibility that all use of land can be prohibited. Surely, *Lucas* envisions greater protection for property rights than this.

II

THE SUPREME COURT OF IOWA'S DECISION WOULD EFFECTIVELY ELIMINATE THE ABILITY OF A LARGE CATEGORY OF PROPERTY OWNERS TO SECURE COMPENSATION FOR PER SE TAKINGS OF THEIR LAND

The *Hunziker* court failed to address the question of what happens to the property rights of the previous owners of petitioners' land. This is a failing of profound consequence, for the ability to transfer--along with the land itself--the right to challenge the application of land use laws, is crucial to the enforcement of property rights. As this Court recognized in *Nollan v. California Coastal Commission*, 483 U.S. at 833 n.2:

> Nor are the [buyers'] rights altered because they acquired the land well after the [government] had begun to implement its policy. So long as the [government] could not have deprived the prior owners of the [property interest] without

> compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

The Supreme Court of Iowa held that prohibitions on use run with the land, *Hunziker*, 519 N.W.2d at 371, but assumed without analysis that the right to challenge these prohibitions does not. This places property rights in peril, particularly under the circumstances of this case. Unlike a zoning regulation that is geographically defined, there is no telling whether the ancient human remains statutes will apply to one's property. As ancient bones could be found buried in any cubic inch of one's land, it is practically impossible to determine with certainty whether the statute applies, until one discovers that it does.

Thus, a facial challenge based on economic impact, which requires a showing that the challenged laws will necessarily deny beneficial or productive use, cannot be prosecuted since there exists the possibility that the law will not apply. *Cf. Agins v. City of Tiburon*, 447 U.S. at 262 (facial challenge rejected because property owners "may be permitted to build" on land). But if subsequent purchasers acquire land in which the potential "limitation or restriction on the use of the land inhered in the [purchasers'] title," *Hunziker*, 519 N.W.2d at 371, then the right to bring a challenge to the laws as applied to that parcel of land vanishes into thin air.

If there is no right to transfer the ability to challenge land use regulations along with the subject property, then the whole impact of the risk posed by the regulations will fall on the seller. The owner at the time the regulations are enacted will have to sell the property at a lower price--with the lower price reflecting a "discount" for the probability that the regulations will apply and the potential impact of the

regulations if they were to apply. This discount might be large, but of necessity will not reduce the price down to the level that will support a facial challenge, namely, a net of zero. The buyer is gambling that all economic value will not be deprived by application of the regulations; the seller always loses the amount of the discount caused by the existence of the potentially applicable regulations. And the state becomes insulated from the liability to compensate private property owners for the taking of all economic value of their land.

Under the *Hunziker* approach, only owners of property who possess the means to develop it prior to sale will be in a position to challenge regulations enacted during the pendency of their ownership. Given the wide sweep of potential jurisdiction, it is doubtful the state archaeologist can give a final determination until development plans are far along and the ripeness of an as-applied challenge hinges on this determination. *See Williamson County*, 473 U.S. at 186-90. Professional, commercial land developers could still, in some occasions, protect their rights. Most individuals, such as a retired couple selling all or part of their farmland for a nest egg, cannot and will have to accept a reduced "discounted" price caused by a cloud on their title due to the potential impact of the regulations on their property. The sum of these discounts will equal the value of the land withdrawn from private use by the state, which avoids paying just compensation.

The Iowa Supreme Court has, for most individuals, eliminated the right to bring an as-applied takings challenge--when a categorical taking normally would have been found. Such a result violates the United States Constitution, regardless of the branch of government that is to blame. *See Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("a State cannot be permitted to

defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all").

CONCLUSION

In failing to determine if the ancient human remains statutes were an extension of the preexisting common law principles of property and nuisance, the Supreme Court of Iowa has violated the express requirements set forth by this Court in *Lucas v. South Carolina Coastal Council*. Rather than judge the enactments in light of the common law yardstick, the court made these enactments the yardstick itself. This decision removed the *Lucas* safeguards against a state's taking of property without payment of just compensation. Further, it ignored the important issue whether owners can transfer their full property rights, including the right to challenge land use regulations, in conflict with this Court's decision in *Nollan v. California Coastal Commission*.

To resolve these conflicts and to reaffirm the fundamental rights of Iowa property owners, Pacific Legal Foundation respectfully submits that this Court should grant the petition for writ of certiorari.

DATED: January, 1995.

Respectfully submitted,

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(4)

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In The

Supreme Court of the United States

October Term, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN, F. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.

Petitioners,

vs.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION and THE ALLIANCE FOR AMERICA IN SUPPORT OF THE PETITIONERS

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, Mountain States Legal Foundation and The Alliance for America submit this brief *amici curiae* in support of Petitioners Erben A. Hunziker, Donald M. Furman, R. Friedrich and Sons, Inc. and Buck Construction Company, Inc. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, The Alliance for America ("Alliance"), is a fifty state network of nearly five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and policy interests, including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally-protected property rights resulting in family and community despair. The Alliance is active in educating the public and lawmakers about the difference between conservation and confiscation.

Amicus, Mountain States Legal Foundation ("MSLF"), is a non-profit, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state

of the country. A large number of MSLFs members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues.

As demonstrated herein, the implications of Petitioners' case far transcend their individual situations and are indicative of problems of nationwide magnitude. This case presents serious questions of how individual rights are to be protected from governmental excesses, both in the enforcement of laws for the ostensible protection of the environment, and in the administration of justice. *Amici* will present a broader perspective of the issues at stake in this case which will assist this Court so as to give clear guidance to lower courts in adjudicating cases such as this that involve important constitutional rights. Moreover, *Amici* believe that the Iowa Supreme Court has done violence to the precedents of this Court that recognize constitutional limitations on the powers of government.

STATEMENT OF THE CASE

This case involves the regulatory taking of real property suitable for the construction of a single family residence. In 1976, Iowa enacted the Ancient Human Remains statutes, Code of Iowa § 263 et seq. and § 716, ("AHRA"), that enable the state archaeologist to investigate, preserve, and reinter discoveries of human remains more than 150 years old. The AHRA was amended in 1978. In short, Iowa wishes to preserve its native American heritage, for present and future generations.

While the AHRA's stated goal is the preservation of ancient human remains, the means chosen to implement

this goal was an immediate and abrupt ban on all permanent construction, including dwellings, within mandated setback lines that totally engulfed the Petitioners' property. It is undisputed that the AHRA precluded the reasonable development and economically viable use of Petitioners' property.

In April 1991, just prior to excavation for the basement of a house, an unknown individual had the state archaeologist probe the property for ancient human remains. In one of twelve probes, the state archaeologist found approximately one cubic inch of human vertebrae and three other small fragments of vertebrae surfaces, plus five tiny unidentifiable bone fragments. The state archaeologist thereupon designated a 34 foot diameter "burial mound," with a 50 foot buffer zone, as a "significant find" under the AHRA and warned the landowner by letter of the criminal penalties concerning disinterment of the remains. This occurred despite the fact that this was the first find of ancient remains in Story County, Iowa, and despite the fact that no other artifacts were discovered that would indicate a burial site.

Petitioners then offered to move the remains, at their expense, to a site in a wooded city park. The state archaeologist refused to allow the move. The state archaeologist subsequently refused to disinter the ancient human remains and to reinter them in the special cemetery established under the Code of Iowa § 263.B.8. Petitioners' request was the functional equivalent of seeking a variance, as permitted by the AHRA. See Iowa Code § 263 B.7. As a result of this denial by the state archaeologist, Petitioners exhausted all of their state remedies. Petitioners filed suit in Iowa State District Court seeking

relief under the Fifth and Fourteenth Amendments to the United States Constitution on the basis that the aforementioned governmental action was a regulatory taking of their property without compensation. The District Court, and subsequently the Iowa Supreme Court, denied Petitioners just compensation for a taking of private property.

The Iowa Supreme Court, purporting to rely on this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992), denied the Petitioners just compensation since their property was purchased after the passage of the Ancient Human Remains statutes in 1976 and 1978. The Iowa Supreme Court incorrectly concluded that all property owners who purchase their property after the passage of the Ancient Human Remains statutes in 1976 are precluded from receiving just compensation for a regulatory taking under these statutes.

SUMMARY OF ARGUMENT

Supreme Court jurisprudence interprets the Takings Clause as requiring just compensation if a state deprives a property owner of all economically beneficial use of his property, as long as the prohibited uses were originally included in the property owner's title. In the instant case, because Iowa's established property and nuisance law did not prohibit Petitioners from constructing a single-family house in a residential area, these prohibited uses were included originally in Petitioners title. Therefore, the Takings Clause requires the State of Iowa to pay Petitioners just compensation.

REASONS FOR GRANTING THE WRIT

Rule 10 of the Supreme Court identifies factors the Court deems important to determining whether a petition for a writ of certiorari should be granted. Two sections of Rule 10.1 are applicable here.

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals.

Rule 10.1(b).

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1(c). *Amici* submit that each of these factors calls for the granting of the petition in this case.

ARGUMENT

I. The Iowa Supreme Court Failed To Apply Properly This Court's Regulatory Takings Jurisprudence.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The Takings Clause was "designed to bar Government from forcing some people to bear public burdens which in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This prohibition applies against the

States through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

For over 130 years, it was believed that the Takings Clause only applied to actual physical invasion or appropriation of property. *Legal Tender Cases*, 12 Wall 457, 551 (1871); *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). However, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes laid this belief to rest when the Court embraced established the concept of "regulatory takings."

In *Pennsylvania Coal*, Justice Holmes recognized that if the rights included in the ownership of private property were subject to qualification pursuant to the police power, "the natural tendency of human nature [would be] to extend the qualifications more until at last private property disappear[ed]." *Id.*, at 415. These concerns brought forth the well-known rule of law that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

Unfortunately, Justice Holmes provided little guidance as to how to determine when a given regulation goes too far for purposes of the Takings Clause. Consequently, since *Pennsylvania Coal*, the Supreme Court has avoided using any set formula for determining when a regulation goes too far, instead preferring to "engag[e] in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978).

However, the Court has identified two situations where regulatory action will require just compensation without the case-specific, factual inquiry. The first situation includes regulations that compel the property owner

to suffer a physical invasion of his property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The second situation is when a regulation denies a property owner all economically beneficial use of the property. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

With respect to this second situation, the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992) recently set forth the test for determining when the Taking Clause requires just compensation. In *Lucas*, the property owner bought two residential lots on a South Carolina barrier island with the intention of building single family homes similar to those on adjacent lots. These plans were shattered in 1988 when a new law established a "baseline" on the island and prohibited any construction of permanent habitable structures seaward of a line parallel to the "baseline." The state trial court determined that the "baseline" effectively barred the property owner from building any permanent habitable structures on the property and that this prohibition deprived the owner of any reasonable economically beneficial use of the property. Thus, the trial court awarded the property owner just compensation. However, the South Carolina Supreme Court reversed and ruled that just compensation is not required when a land use restriction is designed to prevent serious public harm.

On *certiorari*, the Court reversed the South Carolina Supreme Court. In an opinion by Justice Scalia, the Court ruled that a state can avoid compensation when a regulation deprives a landowner of all economically beneficial use "only if . . . the proscribed use interests were not part of his title to begin with." *Lucas*, 112 S. Ct. at 2899. Thus, the Court disagreed with the idea that property is held

subject to the "implied limitation" that the state may eliminate subsequently all economically valuable use. *Id.*, at 2900. Instead the Court ruled that confiscatory regulations that prohibit all economically beneficially use of land:

> cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Id.

Therefore, if Petitioners have private property interests protected by the Takings Clause and the state archaeologists' application of the AHRA deprived Petitioners of all economically beneficial use of their real property, Iowa must pay just compensation if the prohibited uses were originally included in Petitioners' title.[1]

---

[1] In *Lucas*, Justice Scalia, relying on *Andrus v. Allard*, 444 U.S. 51 (1979), wrote that the takings analysis was different in cases involving personal property because the property owner "ought to be aware of the possibility that new regulation might render his property economically worthless." *Lucas*, 112 S. Ct. at 2899. But *Lucas* involved real, not personal property, so that statement was pure *obiter dicta*. In any event, this dictum is inconsistent with *Andrus* because if personal property could never be the subject of a "taking" then there would have been no reason for the Court in *Andrus* to discuss whether the challenged statutes took a "strand" or the whole bundle of rights. *Andrus*, 444 U.S. at 65-66. Thus, the holding in *Andrus* is that, because other strands remain intact, there was no taking – not that personal property could never be the subject of a "taking."

Nevertheless, in the instant case all the bundle of rights were taken. Therefore, the *Lucas* test applies.

At common-law, property is not so much the material thing, as the aggregate of rights that the law annexes to it. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In *Lucas*, the Court reaffirmed the common-law doctrine that certain strands among the bundle of rights are essential attributes of ownership, without which property itself could not exist. *Lucas*, 112 S. Ct. at 2901. These rights include the right to possess, use, and dispose of property. *United States v. General Motors Corp.*, 323 U.S. at 377.

Once it is determined that Petitioners were deprived of all economically beneficially use of their property, Iowa can avoid having to pay just compensation only if the proscribed uses were not included originally in Petitioners' property. *Lucas*, 112 S. Ct. at 2899. In this case, Petitioners were engaging in the lawful use of their property. The State of Iowa could have avoided taking Petitioners' property and the corresponding duty to compensate them by allowing the removal of the remains and reinterment elsewhere as contemplated by the AHRA. This would have served both the State's public purpose and respected Petitioners' constitutional right.

II. The Iowa Supreme Court's Decision Concerning The Date When A Regulatory Taking Occurs Is In Direct And Irreconcilable Conflict With The Decisions Of This Court.

The Iowa Supreme Court incorrectly established 1976 as the date of ripeness and the date of the taking, based on the premise that the Ancient Human Remains statutes were passed in 1976 and 1978. The effect of establishing

1978 as the ripeness and the taking date is to preclude all existing property owners in the state from receiving any compensation for a regulatory taking under these statutes after 1983, since there is a five-year statute of limitations on an action for damage to real property. Section 614.1(4) Code of Iowa. All claims and actions for a regulatory taking by existing property owners under these statutes brought after 1983 would be barred improperly by the erroneous ruling of the Iowa Supreme Court.

The AHRA, on its face, did not immediately or directly regulate Petitioners' property. A family dwelling could have been constructed on the property anytime before the state archaeologist made a significant find and denied permission to rebury the remains in the special cemetery established for that purpose. If the state archaeologist had determined the find was not significant, a family dwelling could have been constructed on the property. If the state archaeologist had allowed the ancient human remains to be reburied in the special cemetery established for that purpose, a family dwelling could have been constructed on the property.

When the AHRA was enacted, no landowner in the entire state of Iowa had any notice that – in the Supreme Court's view – the statute applied to his property, and there was no way of knowing whether the state archaeologist would grant or deny permission to disinter and rebury any ancient human remains if and when the statutes were applied to his property. It is not until the state archaeologist takes the regulatory action under the AHRA, by denying permission to rebury the ancient human remains in the special cemetery established for that purpose, that a regulatory taking occurs under the

AHRA. In this case, the regulatory taking of Petitioners' property occurred after the purchase of Petitioners' property. Therefore, the regulatory taking comes within the purview of *Lucas*, which entitled these Petitioners to just compensation for the regulatory action of the state archaeologist decreeing the denial of permission to rebury the ancient human remains.

This Court in *Lucas* recognized that the "Fifth Amendment is violated *when* land use regulation . . . 'denies an owner economically viable use of his land.' " 505 U.S. at ___, 112 S. Ct. at 2894. (Emphasis Added.)

Further, the Court stated:

> We think, in short that there are good reasons for our frequently expressed belief that *when* the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. (Emphasis Added.)

The decision of the Iowa Supreme Court is contrary to the taking date, ripeness, and accrual of action rules established by the Supreme Court. The Iowa Supreme Court incorrectly would require a property owner to challenge the AHRA at the time it was passed, regardless of whether it has been, or ever will be, applied to a particular property. Existing Supreme Court precedents hold, in reference to a regulatory taking, that a taking has not occurred, and a case is not ripe for judicial review, until the government makes a final decision and thereafter fails to provide adequate compensation for the taking.

A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed."

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 190 n.11 (1985).

> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.

MacDonald, 477 U.S. 340 at 351 (1986).

Further, the Court has held:

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. In *Hodel v. Virginia Surface Mining & Reclamation Assn. Inc.*, 452 U.S. 264 (1981), for example, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 et seq., effect a taking . . .

Williamson County, 473 U.S. at 186.

Therefore, a plaintiff's claim is ripe, and a regulatory taking has occurred when, but not until, the government makes a final decision that takes all economically viable use of the property and fails to compensate the plaintiff for the taking. The final decision of the State in this case did not occur until 1991 when the state archaeologist refused to disinter and rebury the ancient human remains. At that time in 1991, but not until then, was the case ripe for review or was there a taking. The majority decision of the Iowa Supreme Court erred in failing to find that the taking in this case occurred in 1991, which entitles these Petitioners to just compensation.

III. Just Compensation Must Be Paid To A Landowner Whenever The Government Denies The Owner An Important Property Right

A. "Harm" That Is The Necessary Consequence Of The Cautious And Prudent Exercise Of An Acknowledged Right Does Not Constitute A Public Nuisance At Common Law.

The maxim *sic utere tuo ut allenum non laedas* (use your property so as not to injure others) is one well established at common law, but simply begs the question as to what is an injury to others.[2] While damage that is remote (which seems to be the case here) never constitutes a public nuisance, not all proximate injuries constitute nuisances either. *Eaton v. B.C. & M.R.R.*, 51 N.H. 504,

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[2] See *Black's Law Dictionary* 1551 (4th ed. 1968)

527 (1872). The problem is in determining what constitutes a legal injury to another. The reasonable use by a person of his or her own property or the "cautious and prudent exercise of a lawful right," *Rounds v. Mumford*, 2 R.I. 154, 162 (1852), does not constitute a public nuisance. As was stated eloquently more than a century ago in *Helfrich v. Catonsville Water Co.*:

> The reasonable and proper exercise of acknowledged right by one man, may and often does work annoyance and loss to another; but rights cannot be forfeited for this reason.

74 Md. 269, 276 (1891).

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) represents a classic application of this maxim. Echoing the common law maxim that, "The rights of the public in property are to be governed by the same rules of law as the rights of individuals," Justice Holmes, speaking for this Court, held that public agencies that had been so foolish as to acquire only surface rights to land supported by anthracite coal had no more right to the surface support, a distinct property right recognized under Pennsylvania law and owned by certain coal mines, than private individuals would when contracting under similar circumstances. 260 U.S. at 415.

While an exigency existed that warranted public intervention (certainly of much greater magnitude and immediacy than the situation in the present case) the harm caused by the mining of anthracite coal beneath public schools and streets was the necessary consequence of the mine owners' exercise of its mineral and support rights that the State of Pennsylvania had repeatedly

acknowledged as valid. Having once sanctioned the severance of the support estate from the surface, the State of Pennsylvania could not, without resorting to the power of eminent domain, frustrate the reasonable expectations thus engendered, even if their realization resulted necessarily in serious public harm.

Amici have no doubt that the State of Iowa's interest in preserving its heritage is a legitimate one, and for the sake of argument, we can assume it is as substantial as the State of Pennsylvania's interest once was in preventing mine subsidence beneath public streets or schools that had acquired only surface rights. Nonetheless, the Kohler Act in *Pennsylvania Coal* was held a taking because the "harm" caused in that case, whether to private persons or communities, was the necessary consequence of the mine owner's exercise of what had been repeatedly acknowledged by the State of Pennsylvania to be the mine owner's rights.

In the present case, Iowa has permitted the creation of Petitioners' residential lots, and it has permitted Petitioners to acquire them in public commerce with the reasonable expectation of constructing residential dwellings thereupon. While the errors of private individuals or public officials "cannot estop the [State of Iowa] from exercising its police power to abate activity akin to a public nuisance," *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 488 (1987), it has clearly given rise to certain expectations sufficiently bound up with the notion of property that Iowa must condemn them and pay for them before it effectively ousts Petitioners from their property and takes over its management.

While this Court has frequently applied the maxim *sic utere tuo ut allenum non laedas* to "a misuse or illegal use" of property, it has never allowed this term to be applied to prevent "a legal and essential use, an attribute of its ownership," *Keystone* 480 U.S. at 512 (Rehnquist, C.J., dissenting). *Amici* submit that the construction, or the rebuilding, of a house on an individual residential lot is not a public nuisance at common law, nor does it allow itself to be declared so by legislative fiat. As one court put it:

> Although there may undoubtedly be some uses of the land which are sufficiently injurious to others that their use may be prohibited, the normal development of the land for residential purposes is not one of them.

Burrows v. City of Keene, 432 A.2d 15, 21 (N.H. 1981).[3]

B. The Character Of The Governmental Action In This Case Is Confiscatory In Nature Because It Effectively Ousts The Owner From His Property In A Way That Has Been Achieved Customarily Through Eminent Domain Proceedings.

As this Court has noted, another important factor to consider to determine whether a regulatory taking has occurred is the "character of the governmental action."

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[3] No doubt Petitioners' common law rights have been modified somewhat by this Court's ruling in *Ambler Realty Co. v. Euclid*, 272 U.S. 365 (1926). But Petitioners' property is zoned for residential use, and the lots were created under the subdivision regulations of the State of Iowa. While zoning laws are restrictions on the use of land, the zoning laws here permitting residential use merely confirms the common law right already possessed by the Petitioners.

See Keystone, 480 U.S. at 495 (1987). At the far end of the spectrum is a physical invasion or confiscation of property for the benefit of the public. Such activities – for example, the condemnation of property to build public roads or create parks – clearly require compensation to be paid. The owner is ousted from his property.

The Iowa state archaeologist's decree has the effect of ousting the Petitioners from their property by extinguishing a fundamental attribute of ownership: the right to reasonably use the surface estate of one's own property. *See Agins*, 447 U.S. at 262, and *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (both referring to fundamental rights tied to property ownership). As previously discussed, the right to build on one's own property is a basic common law right reserved to the people. *Bostock v. Sams*, 52 A. 665, 668 (Md. 1902). *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.2 (1987) ("(T)he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.' ").

In contrast to the interests at stake in many Supreme Court cases addressing regulatory takings, e.g. *Penn Central* (air rights) and *Keystone* (support or mineral estate), the state archaeologist's order destroys Petitioners' basic right to use the surface estate by building homes thereon. The Supreme Court has never concluded, and *amici* believe could not conclude under its own precedents, that all reasonable use of the surface estate may be denied completely without compensation.

On the other hand, the conservation area imposed by the state archaeologist's order indisputably destroyed all

economically viable use of Petitioner's land and, in effect, converted the parcel into a park for the benefit of the public. While the formation of such a park may well be in the public interest, Iowa cannot indirectly accomplish through regulation what it must otherwise do through condemnation. *See Nollan*, 483 U.S. at 834, 841-42 (requiring grant of an easement would be a taking; improperly conditioning a building permit on such a grant is also a taking).

Indeed the purposes of the archaeological zone are not all that dissimilar to the purposes of a floodplain ordinance declared invalid by a unanimous Supreme Court in *Morris County Land I. Co. v. Parsippany-Troy Hills Tp.*, 193 A.2d 232 (N.J. 1963) in which an oft-cited passage from *Averne Bay Construction Co. v. Thatcher*, 15 N.E.2d 587, 592 (1938), was quoted to the effect that:

> An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.

Morris County, supra, 193 A.2d at 242 (emphasis in original).

As was the case with *Morris County*, the contemplated use under the archaeological zone is of a public or quasi-public nature, and it may be argued that the "prime

object of the [zone] regulations is to retain the land substantially in its natural state." 193 A.2d at 239. *Cf. McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991) (owner deprived of economically viable use of property by floodplain designation properly states a claim for inverse condemnation).

Similarly, a unanimous New Hampshire Supreme Court in *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981) had no trouble finding that a zoning ordinance that placed a portion of the property owner's land in an undevelopable "conservation zone" constituted a taking. While that court cited to the usual balancing tests and the difficulty in some cases of deciding when a regulatory taking has occurred, it easily concluded that the case before it *"does not lie anywhere near the line"* and held the ordinance to constitute a taking. *Id.* at 20 (emphasis added). Indeed, the *Burrows* Court went on to chastise public officials "who have no right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting that expense upon an individual," *id.*, and that inverse condemnation awards, even for a temporary taking, for confiscatory regulations such as the one in that case should "encourage such officials to stay well on the constitutional side of the line [citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J. dissenting)] and should also *discourage harassment of property owners* by repeated amendments of zoning regulations and the enactment of new ones." 432 A.2d at 20 (emphasis added.)

This Court should not allow Iowa and other governmental bodies to avoid the constitutional requirement of

compensating landowners whose property is put to public use. Indeed, it is only of recent vintage (and dwindling public finances) that governmental bodies have sought, in the name of environmental or cultural and historic protection, to circumvent their eminent domain powers and take an individual's property via confiscatory prosecutions and regulations such as the Iowa state archaeologist's order.

CONCLUSION

The Iowa Supreme Court is profoundly mistaken in its analysis of Supreme Court Fifth Amendment jurisprudence. *Amici* submit that the Iowa Supreme Court's bizarre opinion represents the zenith of judicial activism, is bad law, has no place in federal jurisprudence, and merits prompt review.

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No. 94-1077

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. AND BUCK CONSTRUCTION COMPANY, INC.,
Petitioners,

v.

STATE OF IOWA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF *AMICUS CURIAE*, IOWA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The Iowa Farm Bureau Federation (IFBF) is a voluntary general farm organization formed in 1918 under the laws of the State of Iowa. The mission statement of the IFBF is to improve net farm income and the quality of rural life. IFBF was founded in order to protect, promote and represent both farm families and non-farm members who recognize the prosperity of agriculture is essential to the well-being of the State of Iowa. IFBF has over 156,000 member families, and the organization provides a unified voice on legislation that affects them.

The Iowa Farm Bureau Federation has a direct interest in the outcome of this case. The members of IFBF own or lease significant amounts of property, and many depend on their land for their livelihoods. They are, therefore, vitally interested in the proper interpretation of the Just Compensation Clause of the United States Constitution. The Iowa Supreme Court's ruling that a landowner owns his or her land subject to the Ancient Human Remains Statutes of the State of Iowa can be used by the State to effectively dispossess all Iowa property owners of their property rights without paying compensation. This is contrary to the interests of IFBF, its members, and all citizens of the State of Iowa.

STATEMENT OF THE CASE

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use, without just compensation." The issue in this case is whether the Ancient Human Remains statutes of the State of Iowa can be used to effectively render a landowner's real estate valueless without the payment of just compensation therefor.

The IFBF does not propose to duplicate the legal arguments presented in the Petitioner's brief, but rather endorses and urges to this Court the statement of the case and legal arguments set forth therein. IFBF's purpose in submitting this brief amicus curiae is to add the voices of the 156,000 IFBF members to those of hundreds of thousands of Iowa property owners concerned with the dangerous limitations placed on the Fifth Amendment's guarantee of just compensation for regulatory takings as advanced by the lower court below.

SUMMARY OF THE ARGUMENT

The Iowa Supreme Court held that upon passage of a statute with general application to all real properties in the State of Iowa, all persons who purchase real estate subsequent to that enactment shall be precluded from receiving just compensation for the regulatory taking of their property when later the State implements the statute. By adopting such an untenable conclusion, the lower court has effectively prevented all landowners in Iowa from receiving just compensation guaranteed to them by the Fifth Amendment for future regulatory takings emanating from the Ancient Human Remains Statutes of Iowa. Regardless of the date landowners acquire their property, the statute of limitations will prevent them from being compensated even when state action takes away all economically viable use of the property. Such an unjust and unreasonable result was certainly not intended by the Court in Lucas v. South Carolina Coastal Council and the Court's prior rulings.

Guidance is needed from the Court in order to clarify and establish the Court's previous rulings that an action for a regulatory taking is not ripe for action by the Court until the governmental action in question strips away all economically viable use of the property.

I. A REGULATORY TAKING CANNOT OCCUR UNTIL THE GOVERNMENT IMPLEMENTS ENABLING LEGISLATION TO THE EXTENT THAT ALL ECONOMICALLY VIABLE USE OF THE PROPERTY IS DESTROYED.

The Iowa Supreme Court found Plaintiffs were not entitled to compensation on a regulatory taking theory because the Plaintiffs acquired the property ten years after the enactment of the Ancient Human Remains statute. Because the Plaintiffs acquired the real estate after the enabling statute became law, the lower court found the "bundle of rights" the Plaintiffs acquired when they obtained title to the property did not include the right to compensation years later when the state implemented the enabling legislation. This decision improperly misconstrues the Lucas decision and is in conflict with the Court's general rule that no regulatory taking can occur until a final decision is rendered by the government.

The Court has frequently admonished that the constitutionality of statutes should not be determined by the Court until a factual setting is established that makes such a decision absolutely necessary. See Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 294-295 (1981). As the Court previously stated in Hodel, "adherence to this rule is particularly

important in cases raising allegations of an unconstitutional taking of private property." Id., 452 U.S. at 295.

The Hodel decision concerned an attack on a law regulating coal mining prior to the law's enforcement against the particular plaintiff. The Court found the mere enactment of the law did not constitute a regulatory taking. The Act, on its face, did not categorically prohibit coal mining, but rather the conditions upon which coal mining operations could be conducted. The Act also left unregulated the use of the land aside from coal mining. Accordingly, the Court found the "mere enactment" of the Act had not deprived the Plaintiffs of all economically viable use of their property. Since "no concrete controversy" had been presented by the enactment of the legislation, the Court found an action for a regulatory taking was premature. Id., 452 U.S. at 296.

The Supreme Court of Iowa has also adopted this principle, especially with respect to actions for mandamus. The Iowa Court has found mandamus is limited to determining whether a factual issue exists permitting a determination that would produce a measurable decrease in a property's market value. Phelps v. Board of Supervisors, 211 N.W.2d 274 (Iowa 1973); Fitzgerald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992). Until state action has occurred and such decision is final, the action is not "ripe" for

determination by the courts. Bakken v. City of Council Bluffs, 470 N.W.2d 34, 36 (Iowa 1991).

The same rationale should be used in the present case and in future cases involving state implementation of the Ancient Human Remains Statutes. Had these Plaintiffs, their predecessors in land ownership, or any other landowner in Iowa presented a facial challenge to the Legislation prior to the discovery or knowledge of human remains on their land, the court would have likely, and correctly, dismissed such a claim as premature. By its terms, Iowa Code Chapter 263B does not necessarily restrict the use of real estate. The statute merely provides that the state archeologist shall have primary responsibility for investigating, preserving, and reinterring discoveries of ancient human remains.[1] Once such remains are discovered, the legislation only states "the state archeologist shall have the authority to deny permission to disinter human remains."[2] Based on this language alone, a landowner has no way of knowing what, if any, action will be taken by the state archeologist. Even a landowner with knowledge ancient human remains are located on his property has no cause of action or loss in value to his property until the state archeologist denies the landowner permission to disinter the human remains. It is at that moment the property is devalued by government action. Until that time the

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[1] Section 263B.7, Code of Iowa.

[2] Section 263B.9, Code of Iowa (emphasis supplied).

enactment of the Ancient Human Remains Act has had no effect on land ownership and use whatsoever as no final state action has occurred.

The Court has previously looked at this issue in the Agins decision.[3] In Agins, the Plaintiff had acquired five acres of unimproved land for residential development. The City of Tiburon, California later adopted zoning ordinances restricting the number of residences to be built on the tract. Without applying for permission to build as allowed by ordinance, the Plaintiff brought suit alleging the City had completely destroyed the value of the property. The Court found the zoning ordinance on its face did not amount to a regulatory taking.[4] Because the statute did not prevent all future land development, but rather allowed the plaintiffs the ability to pursue other reasonable investment expectations, it was premature to find a taking had occurred. Agins v. Tiburon, 447 U.S. 255 (1980).

In the case at bar, the Plaintiffs are not left to pursue other reasonable, investment-backed expectations. Both the majority and the minority opinions of the lower court acknowledge the state archeologist's decision to deny permission to disinter the ancient human remains has eliminated all economically viable use of the property in question. Unlike the plaintiff in Agins, the

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[3] Agins v. Tiburon, 447 U.S. 255 (1980).

[4] Agins v. Tiburon, 447 U.S. at 259.

decision has precluded the Plaintiffs from all investment expectations regarding the property.

The Keystone decision also involved a facial constitutional challenge to legislation. Once again the Court followed the rule that no regulatory taking can be established unless the petitioner can show the legislation has unduly interfered with his or her investment-backed expectations for the property.[5] As the Court stated,

> "we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation."

Keystone Bituminous Coal Assn., et al v. DeBenedictis, Secretary, Pennsylvania Dept. of Environmental Resources, et al., 480 U.S. at 495.

This is exactly the type of distinction the Iowa Supreme Court chose to ignore. The enactment of the legislation had no impact on the Plaintiff's property until the final decision of the state archeologist. Not until that decision -- a government action implementing prior

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[5] Keystone Bituminous Coal Assn., et al v. DeBenedictis, Secretary, Pennsylvania Dept. of Environmental Resources, et al., 480 U.S. 470 (1987).

legislation -- were the Plaintiffs entitled to just compensation.

The Court has further addressed this point in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). In that action, a landowner claimed a taking had occurred after the enactment of a particular ordinance. The Court found the action was "premature" and stated:

> "As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."

Id., 473 U.S. at 186. As the Williamson Court explained:

> "(T)he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury."

Id., 473 U.S. at 193. As the Court astutely acknowledged, the economic impact on a challenged state action cannot be evaluated until there is a final

decision regarding how the regulation will be applied to the particular land in question. Id., 473 U.S. at 191. In Keystone, the ordinance still left open the possibility the Petitioner could develop his property after obtaining variances; a final, reviewable decision had not yet occurred and an action for governmental taking could not lie. Id.

The principle that a final governmental decision is required before a taking can occur was reiterated by the Court in MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1985). As the Court succinctly stated, "any court cannot determine whether a regulation goes too far unless it knows how far the regulation goes." Id., 477 U.S. at 348.

The position of the Iowa Supreme Court blatantly ignores this important hurdle. At the time the Ancient Human Remains Act was enacted, it had no immediate effect on any real estate in Iowa, except to the extent permission was required to disinter human remains.[6] With regard to property owners who had not previously known human remains existed on their property, several steps had to occur before the statute's true impact could be known. First, someone had to suspect or find human remains. As the evidence showed in this case, this itself is no small feat. The human remains discovered in this case were 1000 to 2500 years old. After all that time, they were only unearthed after an unknown individual

[6] Section 263B.7, Code of Iowa.

"suspected" they might be there. It took the state archeologist twelve separate probes to find a cubic inch of human vertebrae, three small fragments of vertebrae surfaces, and five tiny, unidentifiable fragments.

Once the human remains are found, the landowner still has no idea what effect that has on the real estate. The impact depends upon the state archeologist's decision whether the remains discovered constitute a "significant find" pursuant to the statute. When and if the archeologist determines the finding is indeed significant, this still does not necessarily impact the landowner's property. The Code of Iowa establishes a state cemetery for the reinternment of human remains.[7] The Code further provides only that the state archeologist "has authority to deny permission" to disinter human remains upon request of the landowner.[8] Until the state archeologist actually denies such permission, the legislation does not impact the property's value at all. In the case at bar, that denial did not occur until 1991, well after the landowner purchased the property. It is at that moment the property was rendered valueless and a regulatory taking occurred.

The lower court sought to avoid this resolution based solely on the date the property was transferred to the Plaintiffs, reasoning that at the time the property

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[7] Section 263B.8, Code of Iowa.

[8] Section 263B.9, Code of Iowa (emphasis added).

was transferred, the state could have prevented disinternment. This assertion happens to be true of every property in Iowa regardless of date of ownership. Until the hurdles outlined above are placed before the landowner and permission to disinter is denied, this statute does not have any greater application to the Plaintiffs here than to a farm family who may have owned the property for 100 years. The timing of the land ownership is a distinction without a difference. It is the implementation of this legislation and not its enactment that triggers the regulatory taking, regardless of the length of ownership or the identity of the landowner involved.

The lower court's reliance on the Lucas[9] decision is misplaced. The Lucas decision certainly did not provide that if a statute is enacted prior to land ownership, and is implemented subsequent to its purchase to the extent the implementation renders the property worthless, no compensation should be granted. Common sense and fairness would not dictate such a conclusion. In Lucas, the regulation involved restrictions in building residences on coastal land. The particular restriction was not enacted into law until after the plaintiff obtained the property in question. Until that time, the plaintiff had the right to build a home on his coastal property. The timing of this regulation made a huge difference in the Lucas case because upon enactment of the legislation,

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[9] Lucas v. South Carolina Coastal Council, 505 U.S. _____, _____, 112 S.Ct. 2886, 120, L.Ed.2d 798 (1992).

there was an immediate impact on the property. Prior to the enactment of the legislation, the plaintiff was certainly already aware of South Carolina's interest in its coastal zones and its general regulation of uses in coastal areas.[10] The State's general interest only became a problem for Mr. Lucas when self-executing legislation was enacted directly impacting his property.

The Ancient Human Remains Statutes of Iowa, as enacted, are not self-executing. The legislation does no more than inform all owners and tenants of Iowa land that the state is interested in preserving ancient remains. It does not tell owners where those remains are located, what constitutes a significant find, or the state's plans regarding disinterring those remains. It does not impact landowners until the enabling legislation is implemented in a specific manner on a particular piece of real estate, as in this case.

A more reasonable construction of the Lucas decision actually supports the Plaintiff's claim. As was stated by this Court and cited by the minority in the lower court in the case at bar:

> "(T)here are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in

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[10] 505 U.S. _____, _____, 112 S.Ct. 1886, 2889 (1992).

> the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

Id. 505 U.S. at _____, 112 S.Ct. at 2895, 120 L.Ed.2d at 815.

The case at hand is a perfect example of this principle, further elaborated in Armstrong v. United States:

> "(T)he Fifth Amendment's guarantee . . [is] designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole."

Id., 364 U.S. 40, 49 (1960).

The Iowa Farm Bureau Federation concedes that legislation designed to promote the general welfare often burdens some citizens more than others.[11] The IFBF also recognizes the protection and preservation of archeological sites is likely included in the broad

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[11] See Penn Central Transp. Co. v. New York City, 438 U.S. 104 at 133 (1977).

spectrum of legitimate interests of the government.[12] The only question in this case revolves around whether the associated costs to the landowner must be borne by the landowner entirely or by all taxpayers. In answering that question, the Court must recognize the preservation and protection of property rights is every bit as important for the public as the preservation of these ancient bones. In fact, two centuries ago the Framers of our Constitution saw the protection of property rights -- land in particular -- as the "first object of government." Federalist No. 10 at 78 (Madison) (C. Rossiter ed. 1961).

Over eighty years ago Justice Holmes recognized both the necessity and the inherent danger of changes in the general law. In the often cited and much quoted words of Justice Holmes:

> "Government could hardly go on if to some extent values incident to property could be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police powers. But obviously the

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[12] "The information in these sites expands our knowledge of of human history and prehistory and thus enriches us as a state, nation, and as human beings," Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000,1005 (Indiana 1989).

> implied limitation must have its limits, or the contract and due process clauses are gone."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 at 413 (1922). Justice Holmes continued on to warn:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears . . .
>
> The general rule at least is, that while property may be regulated to a certain extent, if it goes too far it will be recognized as a taking."

Id., 260 U.S. at 415.

Simply put, the Ancient Human Remains Statute goes too far with respect to Lot 15 of Northridge Estates; but did not until the state's application and implementation of the statute to that property. The enactment of the legislation did not affect, nor take for public use, the property rights of the Plaintiffs, but its implementation has done just that. It is hard to imagine a governmental action that could go much further than to render a landowner's property essentially worthless as was done here. The lower court's ruling that the

Ancient Human Remains statute cannot be challenged by landowners despite the government's regulatory taking of their property because "the proscribed use interests were not part of title to begin with"[13] defies not only fairness and common sense, but the Constitution itself. No logical or reasonable inquiry by the Plaintiffs would have necessarily revealed that the Ancient Human Remains statute had rendered their property useless, because when they obtained the property that was not true. This could not be determined, predicted, or perhaps even imagined by the Plaintiff, until the State archeologist denied permission to disinter the remains. At that point, Plaintiffs lost their investment in Lot 15 entirely and should be compensated accordingly.

As all governments, the State of Iowa is every mindful of the financial condition of the state. When budgetary concerns are pressuring state government, and even the courts, it may seem easier to find the preservation of Iowa's heritage could be more easily borne by corporations and developers such as Plaintiffs rather than overburdened individual taxpayers. However, this is simply not constitutional. To uphold the trial court in this manner would ignore the admonition of Justice Holmes: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a short cut rather than the constitutional way of paying for the change." Id., 260 U.S. at 416.

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[13] Lucas, 505 U.S. at _____, 112 S.Ct. at 2899.

The Iowa Supreme Court's decision has not only unfairly denied compensation to the Plaintiffs, it has reduced to bare bones the property rights of all Iowans. As the lower court found in the minority opinion:

> "In this case, a dead bones doctrine has risen from the soil, like a phoenix, to consume the live marrow of land ownership. The history surrounding these ancient bones should be preserved by granting compensation for its resurrection."

CONCLUSION

The lower court's ruling is contrary to previous rulings of the Court that an action for regulatory taking is never ripe for decision by the courts until a final action has been taken by the government authority in question. Past decisions of the Court have developed the rule that an action cannot lie until the impact on the property involved has been determined. A decision by the Court is necessary to preserve the distinction between enabling legislation and governmental implementation of such legislation. Without the development of a rule to guide the lower court, the Iowa court's decision can be used to deny just compensation to all property owners in the state of Iowa when property is purchased after enabling legislation is enacted but before such legislation has any measurable

or substantive impact on the property involved. Finally, the lower court must be reversed to provide the Plaintiffs just compensation in this case. If the State of Iowa wants to preserve the history of its heritage for its citizens, landowners should not be forced to shoulder the entire burden for that preservation. The State should preserve its heritage the constitutional way and pay for it.

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STATE OF IOWA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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Other Authorities

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The National Association of Home Builders ("NAHB") has received the written consent of the parties to file this brief as amicus curiae in support of the Petitioner and have filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The NAHB represents 180,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has been before this Court either as an amicus curiae in support of, or as of counsel on behalf of, the property owner in prior "takings" cases involving governments' land use decisions. Dolan v. City of Tigard, 114 S.Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); Yee v. City of Escondido, 112 S.Ct. 1522 (1992); Nollan v. California Coastal Commn., 483 U.S. 825 (1987);[1] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v.

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[1]The NAHB brief was cited approvingly in this Court's Nollan opinion, 483 U.S. at 840.

Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is of paramount importance to this amicus and its members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The former type of governmental imposition is presented in this case by the State of Iowa's demand that an individual property owner preserve an entire parcel of land for the purpose of anthropological research.

Whether the preservation of Lot 15--the subject parcel of land--for the purposes of preserving an ancient Indian burial ground is a legitimate or even worthwhile goal is irrelevant.[2] The sole question presented is whether this

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[2]Indeed, petitioners concede, and NAHB agrees, that the preservation of archaeological finds is a legitimatepublic goal. Fairness and justice dictate, however, that the public should pay for the cost of the land that is preserved for the benefit of the public, rather than forcing some people alone to bear these public burdens. See Andrus v. Allard, 444 U.S. 51, 65 (1979). "[T]he question at bottom is upon whom the loss ... should fall." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

preservation burden should be shouldered by individual property owners without the State of Iowa providing just compensation. While this would appear to be a settled question of law, the decision below effectively overrules no less than four (4) of this Court's decisions. Indeed, the Iowa Supreme Court has so departed from this Court's prior takings jurisprudence that this Court's intervention is necessary.

The NAHB's interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on constitutional guarantees. As Justice Brandeis insightfully admonished:

> Experience should teach us to be most on our guard to protect liberty when government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[3]

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Iowa Supreme Court's decision so radically departed from this Court's prior takings jurisprudence that this Court's intervention is necessary so as to ensure the proper, fair and consistent administration of federal Fifth

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[3]Olmstead v. United States, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting).

Amendment rights in the State of Iowa. Indeed, in the instant case, the Iowa Supreme Court has sanctioned a 100% taking without compensation. As such, the decision below, in effect, renders certain federal protections for individual Iowa property owners nugatory.

REASONS FOR GRANTING THE WRIT

A. THE IOWA SUPREME COURT DECISION COMPLETELY MISREADS LUCAS, OBVIATING THE RIPENESS DOCTRINE

The majority opinion below reasons that petitioners' title never included the right to build on Lot 15 due to the Iowa state law concerning ancient human remains.[4] "This limitation or restriction on the use of the land inhered in the plaintiffs' title [since 'the State, under existing state law, could have prevented disinternment']."[5] This reasoning is based on a misapplication of Lucas[6] and renders the ripeness doctrine nugatory in the State of Iowa.

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[4]See Petition for Writ of Certiorari, Appendix A at A10-11.

[5]Id. (emphasis added).

[6]Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

1. The Iowa Statutory Restrictions Do Not "Inhere" In Lot 15's Title

The majority opinion's holding is based upon a flawed reading of Lucas.[7] The majority opinion misconstrues and misapplies this Court's discussion of preexisting limitations, 112 S.Ct. at 2900, equating the 1976 ancient human remains laws to the law of nuisance.[8] The comparison, and its resulting application, however, is inapposite. In Lucas, the Court discussed the principle of nuisance, which may be defined as:

> [A]ctivity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public. . . .[9]

The Court cited examples of property uses that are inherently unreasonable and, accordingly, may be prohibited or restricted by government, such as activities causing the flooding of another's property or operating a nuclear power plant astride an earthquake fault. 112 S.Ct. at 2900-01. These are activities which the average person knows, or should know, are inherently unreasonable and conceivably

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[7]See Petition for Certiorari, Appendix A at A10-11.

[8]Id.

[9]See Black's Law Dictionary, Fifth Edition.

dangerous and thus, may be prohibited. In other words, the average person knows that his "bundle of rights" does not include the right to use his property in such a way so as to infringe upon the property rights of others.

The petitioners' proposed use of Lot 15 in no way infringed upon the property rights of others. Home building is not a nuisance, even if it means disturbing ancient artifacts. Indeed, home building is one of the most basic and common uses of property. Furthermore, despite the fact that the legislation predated petitioners' acquisition of Lot 15, there was no notice that the government would restrict the property's use. It was not until after the purchase of Lot 15 and the beginning of construction that anyone knew that there were remains present on Lot 15.[10] Indeed, even after the discovery, it was not immediately clear that the government would prohibit the development of the property. Only after the state archaeologist's administrative decision did petitioners learn of the restrictions. It is, therefore, specious reasoning to claim, as the majority decision does, that the restrictions "ran . . . with the land."[11]

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[10]See Petition for Writ of Certiorari at 3. It is interesting to note that the entire use of Lot 15 has been prohibited due to the discovery of approximately one cubic inch of human vertebrae, along with eight other small fragments. One wonders how the average person would go about discovering the presence of these small, subsurface items on a one-third acre lot, much less recognizing their significance.

[11]See Petition for Certiorari, Appendix A at A9.

2. The Iowa Supreme Court Decision Renders The Ripeness Doctrine Nugatory

The ripeness doctrine holds that judicial review of a regulatory taking is inappropriate until such time as the government makes a final decision and declines compensation.[12] "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson County, 473 U.S. at 186. Thus, contrary to the Iowa Supreme Court, the question in this case is not if the State could have prevented disinternment, but when did the State prevent disinternment and deny compensation. As the record clearly reflects, this action did not occur until after the Iowa state archaeologist refused to exercise his discretion and allow the remains' disinternment.[13] It was at that point in time--and not before--that the taking occurred and the administrative process had been exhausted, allowing petitioners to seek their judicial remedies.

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[12]See Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

[13]See Petition for Writ of Certiorari at 3-4. See also Iowa Code §§ 263B.9 (authorizing the state archaeologist to allow the disinternment ofancient human remains) and 263B.8 (establishes a cemetery for the reburial of disinterned ancient human remains).

The Iowa Supreme Court dismissed petitioners' contention that the taking occurred when the state archaeologist applied the statutes to Lot 15, holding instead that the mere enactment of the legislation in 1976 prohibited building on Lot 15. This analysis ignores the provisions requiring the disinternment of the remains,[14] as well as those allowing the state archaeologist to prohibit disinternment if he designates the find to be "significant".[15] More importantly, the Iowa Supreme Court's decision fails to consider this Court's admonition against challenging legislation on a takings theory outside the context of a factual setting. This Court clearly stated in Keystone Bituminous Coal Assn. v. DeBenedictis that:

> "the constitutionality of statutes ought not to be decided except in a factual setting that makes such a decision necessary. . . Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property."

480 U.S. 470, 494 (1987)(quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 294-95 (1981)). See also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972); Rescue Army v. Municipal Court, 331 U.S. 549, 568-575, 584 (1947); Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).

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[14]Iowa Code §263B.7.

[15]Iowa Code §263B.9.

The majority opinion's analysis rewrites the rules on challenging state action in enforcing federal Fifth Amendment rights in direct contradiction of MacDonald and Williamson County, as well as Hodel and Keystone. In effect, the Iowa Supreme Court has chosen to overrule this Court's holdings and to chart its own course with respect to the enforcement of federal Fifth Amendment rights. This Court should reassert its authority in the State of Iowa.

B. THE IOWA SUPREME COURT'S DECISION SANCTIONS A COMPLETE TAKING WITHOUT COMPENSATION

There has been a one hundred percent (100%) taking in this case for which there has been no compensation. As stated in dissent by Iowa Supreme Court Justice Snell, "[t]his case is about whether the State of Iowa has the right to take a person's land and not pay for it."[16] The Iowa state archaeologist's actions in effect turn Lot 15 into a museum dedicated to the preservation and research of ancient Indian remains. Petitioners have lost all economically viable use of the property, and the property's value has declined from $50,000.00 to $100.00.[17] If the Fifth Amendment's takings clause means anything, this decision cannot stand. The result runs contrary to the Constitution's plain meaning, as well as the totality of this Court's takings jurisprudence.

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[16]See Petition for Writ of Certiorari, Appendix A at A12.

[17]See Petition for Writ of Certiorari, Appendix A at A13.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, the NAHB prays that this Court issue a writ of certiorari to review the judgment and opinion of the Iowa Supreme Court.

Respectfully submitted,

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